# THE DOCTRINE OF REBUS SIC STANTIBUS IN INTERNATIONAL LAW

BY

TING-YOUNG HUANG

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A DISSERTATION

Submitted to the Board of University Studies of the Johns Hopkins University in Conformity with the Requirements for the Degree of Doctor of Philosophy

1933

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Univ. Baltimore

SHANGHAI

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# PREFACE

*Rebus sic stantibus* tends to become a two-edged sword which may be used for both defense and offense. In fact, as history and recent events have shown, the principle of *rebus sic stantibus* has quite often been invoked as an instrument of aggression. Under the present system of international relations, in which force is still a dominant factor, the practical utility of asserting any international claim still depends to a large extent upon the political and military power of the state advancing it. This is conspicuously evident when one considers the recent invocation of the doctrine as an instrument of territorial aggrandizement which has occurred in the Far East during last few years.

In this study, the writer's object is to approach the problem from a peace angle. He hardly agrees with those writers who uphold the traditional view that war is the only perfectly legitimate way of terminating an obsolete treaty. Rather, he is convinced, in view of the presence of provisions in the Covenant of the League, the Kellog Pact and many other bilateral arbitration and conciliation treaties, that the better way of modifying treaties and settling international disputes is through peaceful means.

It is a commonplace to say that to nearly every question there are at least two sides, and it is certain that the side from which any problem is approached must in-

fluence the conclusions reached. This is particularly true of problems in international relations. In the past, it has nearly always been taken for granted that international law consists in my country's rights and your country's duties. However, the tendency of recent writers on international law is against this traditional view and places more emphasis on the duties of states than on their rights. In truth, as has been observed by William E. Hall, the ultimate foundation of international law is an assumption that states possess rights and are subject to duties corresponding to the facts of their postulated nature.[1] Thus viewed, the world order may be much improved if international lawyers today will expound the doctrine that the extent to which a state can expect to achieve recognition of its rights depends on the extent to which, and the success with which, it fulfills the purposes for which states exist. In order to show the principle of correlation between rights and duties among nations the writer deems it pertinent to quote a few lines from an eminent jurist on the Supreme Bench of the United States. Chief Justice Charles E. Hughes speaking before the Annual Conference of the American Society of International Law in April, 1927, said:

> Taking into consideration the mutual relations that are implied in the existence of the society of states, the very fact that we recognize the right of powers to negotiate agreements between themselves, the very fact that we recognize the sanctity of engagements made internationally, must lead us to the conclusion that there is a weighty obligation on all states continually to be responsive to demands for

[1] Hall, *International Law* (8th edition), p. 50.

changes, where circumstances have altered and where any engagement heretofore made could be said to bear inequitably upon the other party to the engagement.[2]

Besides this, the writer holds that the duty of students of international law today is not confined to enunciating what they believe to be the existing rules of law. Rather, he is convinced that, if international law is to be treated as a science and to be developed into a true system of law, the work cannot be limited merely to the ascertainment and interpretation of its strictly positive rules and to following the beaten track of predecessors, but must include and expose the fundamental principles which lie underneath. This is especially so when we consider such a vague and uncertain concept of law as that of *rebus sic stantibus.*

Thus in this study the writer will view law as a product of dynamic forces. Fundamentally, as he believes, law, in the liberal sense, is but the reasoned adjustment of human relations. As human relations are forever changing, sometimes with kaleidoscopic swiftness, it follows that by its very nature, law can never be static. Jefferson asserts this view, even as applying to the constitutional law of the United States, when he says that law is made "for the living and not for the dead." Law, whether municipal or international, should be made to meet the necessities of a changing time and a changing people. It has no inherent sanctity other than that of reason and utility.

[2] See *Proceedings of the American Society of International Law*, 1927, p. 95.

The traditional sacerdotal conception of the sanctity of laws, whether they be wise or unwise, is blind to the essential fact that it is futile to ask a people to respect a law which is intrinsically not worthy of respect. This fundamental conception of law applies to every branch of jurisprudence, be it constitutional or international. Thus viewed, the writer believes that it is practically impossible to uphold the sanctity of treaties without considering the principle of change. In a word, law cannot be considered merely from the angle of existing legal rights or the *status quo;* it ought to be viewed in its entirety. In other words, he regards pure positivism, which rejects reason and accepts only practice, as inadequate in the sphere of law, and especially in so incomplete a system as is international law.

Since the doctrine under consideration has sometimes been criticized by Common Law students as a defunct principle of Civil Law, naturally the problem underlying the application of the doctrine has not yet received due consideration in Anglo-American jurisprudence. For in considering any problem Anglo-American jurists, influenced by their national idiosyncrasies, have turned their minds, whenever possible, from any examination of the general principles of law, and instead have sought to apply the specific rules of Common Law to concrete cases. Consequently, a thorough and conclusive work on the subject has not yet appeared in the English language.[3] At times, of course, English text writers have

[3] See note 3 on page ix.

voiced seemingly definite opinions; yet, when examination of them is made, they are found to be bewilderingly diverse and sometimes flatly contradictory.

To Professor W. W. Willoughby under whose guidance this study was undertaken, the author is greatly indebted, particularly for the constant encouragement and kind criticisms offered during the progress of the work. The author also wishes to express his thanks for the helpful suggestions of Professor J. W. Garner of the University of Illinois and Dr. Frederick S. Dunn, formerly Creswell Lecturer on International Law in the Page School of International Relations of the Johns Hopkins University. Both Professor Willoughby and Dr. Dunn were very kind in reading the manuscript and in making various valuable suggestions. Dr. W. B. Nance of Soochow University, Soochow, China, when asked to read the manuscript before it went to the press, entered numerous valuable corrections to which the author is also deeply obliged. For any errors in fact or judgment, however, the author alone is responsible.

T. Y. H.

Soochow University, *September, 1935*

[3] To the pleasure of the writer a monograph written in English by Chesney Hill was found when this study was already completed, which contains some ninety pages under the same title as the present one and was published in 1934 by the University of Missouri, Columbia, U.S.A. This, we are told, was prepared as a doctoral dissertation at Harvard University under the title *The Termination of Obsolete Treaties*. It was subsequently rewritten and condensed into its present form. See L. M. Goodrich in *American Journal of International Law*, April, 1935, p. 366.

# CONTENTS


*Page*

PREFACE ..... v

CHAPTER

I. GENERAL NATURE OF THE PROBLEM 1
1. The Dilemma ..... 1
2. Complexity of the Doctrine ..... 1
3. Importance of the Problem ..... 4
4. Difficulties Inherent in the Doctrine ..... 7
5. Method, Scope and Purpose of the Investigation ..... 14

II. THE DOCTRINE AS ENVISAGED BY PUBLICISTS ..... 17
1. A Principle in International Law ..... 17
2. Interpretation of the Scope and Conditions 23
3. Extent of the Right ..... 31
4. Treaties of Peace ..... 34
5. Recent Legal Interpretations of the Doctrine by English Writers ..... 39

III. DIPLOMATIC INSTANCES ..... 47
1. How Far Precedents of State Practice can be Employed as a Basis for the Interpretation of the Doctrine ..... 47
2. Classification of Cases Based on Procedure as Provided in International Law ..... 54
(a) Cases of Nonconformity with the Proper Procedure ..... 54
(b) Cases of Conformity with the Proper Procedure ..... 71
(c) Cases of Mutual Recognition ..... 85
3. Summary Observation ..... 92

CHAPTER

IV. RÔLE OF THE DOCTRINE IN THE COVENANT OF THE LEAGUE OF NATIONS 94
1. Introduction ..... 94
2. Origin of Article XIX ..... 95
3. Application of Article XIX ..... 103
4. Criticisms ..... 109
(a) General Applicability ..... 109
(b) Unanimity Principle ..... 110
(c) Ineffective Machinery ..... 116
5. Article XI ..... 118
6. Principle of the Doctrine as Embodied in Article XIX—Their Relationship ..... 120

V. JURISPRUDENCE OF THE DOCTRINE IN THE WORLD COURT AND OTHER JUDICIAL TRIBUNALS ..... 130
1. Introduction ..... 130
2. Cases in the World Court ..... 131
3. Cases in Other Judicial Tribunals ..... 144
4. Summary Observation ..... 165

BIBLIOGRAPHY ..... 173

# CHAPTER I

## General Nature of the Problem

### § 1. *The Dilemma*

It has been almost unanimously recognized among writers on international law that, underlying the whole law of treaties, the rule *pacta sunt servanda* constitutes a basis without which international security would be largely illusory. At the same time, it has been equally emphasized since Grotius and Vattel's time that, since it is impossible to lay down, as a general rule, that treaty obligations are absolutely and unquestionably binding on the parties forever, the principle of *rebus sic stantibus* should be read into every treaty. These two closely related principles, *pacta sunt servanda* and *rebus sic stantibus,* thus constitute an obvious dilemma when we discuss any problem relating to the binding force of treaties.

### § 2. *Complexity of the Doctrine*

One of the most difficult and delicate problems presented by the discussion of the binding force of international treaties is the question, "whether a state is released from its treaty obligations by reason of an essential change of the circumstances under which the treaty was concluded."[1] Lauterpacht, in his *Private Law Sources and Analogies of International Law,* states that

[1] Fenwick, *International law* (1924), p. 344.

"there are only a few problems of international law which have caused more embarrassment to international publicists, or which are more unsettled, than the doctrine in question."[2] Professor Brierly of the University of Oxford also remarks that "International Law is confronted here with one of the most difficult of international problems, that hitherto it has hardly attempted to solve it, and that it is somewhat too apt to leave in a decent obscurity certain aspects of the problem, to which its attitude would be difficult to justify in a court of morals."[3] These remarks summarize, in general terms, the complexity and difficulty[4] of the doctrine in question, and, to some extent, call forth our attention to this highly complicated problem. The views of publicists throw little real light on the subject. In short, although the question as set forth by Professor Fenwick has put the fundamental law of the good faith of treaties to crucial test, international jurisprudence gives as yet but a vague and unsatisfactory answer.

Most writers on international law tell us merely that the doctrine is a general principle of law which is perfectly recognized in private law for the safeguarding of certain social values relating either to the public good in general or to the freedom and development of human

[2] (London, 1927), p. 167.

[3] Brierly, "Some Considerations on the Obsolescense of Treaties" in *Transactions of the Grotius Society*, Vol. XI, p. 11.

[4] Lord Macnaghton once said of the rule in *Shelley's Case*, "It is one thing to put it in a nutshell and another thing to keep it there." *Van Grutten v. Foxwell* (1897) A.C., at p. 671. Quoted from Brierly's article, *loc. cit.*, p. 13.

personality in particular. On the other hand, a few practical writers, seeing the dangerous aspects inherent in a doctrine which may amount to the very negation of law, have stated that the doctrine, broadly interpreted, would give one of the contracting parties at any time the right to free itself at its own discretion. To that extent, they argue, the doctrine would reduce any international treaty to a "scrap of paper" and the obligation resulting from it, to a rope of sand.[5] By the former, the doctrine would be regarded as a just and necessary means of defending national interest and of self-preservation, and it would be unreasonable and impossible to eject it *in toto* from the body of international law. By the latter, the doctrine is commonly styled "mischievous" and "notorious" and its appearance in the sphere of international law a manifestation of the absence of law within the international community and of the imperfect development of that high jurisprudence.[6] Furthermore, the latter argue that the doctrine in question is essentially unjuridical[7] in nature, and that it has been defended by publicists and invoked by nations purely for purposes of political expediency. Besides these two opposing groups, there has been a group of radical writers, mostly

[5] See Keeton, "The Revision Clause in Certain Chinese Treaties" in *British Year Book of International Law* (hereafter cited as B.Y.I.L.), 1929, pp. 111, 112.

[6] See Lauterpacht, *Private Law Sources and Analogies of International Law* (hereafter cited as *Analogies*), pp. 167, 169.

[7] Brierly, in his *The Law of Nations,* p. 174, remarks: "The doctrine itself is essentially unjuridical, and even if political motives sometimes lead to a treaty being treated as a 'scrap of paper', international lawyers need not invent a pseudo-legal principle to justify such acts."

German nationalists of the nineteenth century, who upheld the doctrine as an incontrovertible maxim for the unilateral repudiation of treaty obligations upon the ground not only of the national existence and independence of the state and the maintenance of vital interests, but also of expediency.[8]

In addition to the confusion and disagreement presented by writers concerning the implications and value of the doctrine, there are a number of cases in which the doctrine has been invoked, directly or indirectly, which seem to intensify the obscurity and uncertainty of the doctrine as to its scope, interpretation and application. In some cases, the doctrine has been pleaded in justification of acts of international immorality and a cynical disregard for a state's pledged word, or to cover territorial ambitions and selfish policies. In other cases, it has been pleaded mainly on the ground of a right of self-preservation or for the recovery of national rights and the development of national interests.

In view of the complexity and uncertainty suggested above it would seem that the doctrine in question should be subjected to the most careful scrutiny.

## § 3. *Importance of the Problem*

In theory and practice, as indicated above, the doctrine under discussion presents a problem of consider-

[8] For a summary of their views, see Garner, "The Doctrine of *Rebus Sic Stantibus* and the Termination of Treaties" in *American Journal of International Law* (hereafter cited as A.J.I.L.), Vol. XXI (1927), pp. 512-513.

able importance to students of international law. Besides the fact that it may be condemned as a "notorious principle" or as a "cloak for the shield of law", either individually through governmental protests or collectively by international declaration, there is the further fact that, by reason of tht remarkable unforeseen changes, economical and political, which have taken place in the life among states today as a result of the rapid growth of civilization, the number of instances in which the doctrine has been invoked has greatly increased,[9] and hence the problem has become the more serious.

Furthermore, while the validity of the doctrine was challenged sixty years ago by the Powers signatory to the Declaration of London of 1871, today, we find the image of the doctrine expressed in an important international covenant.[10] Manifestly this important change of attitsde shown by the Powers indicates the continued existence of a grave problem requiring, perhaps, international legislative action.

Finally the world is today, economically and politically speaking, woven together by a net-work of treaties through which states maintain their normal relations. If there is no safe-guarding principle relative to the termination and revision of a treaty which may be out of date or no longer correspond to existing conditions and the operation of which may endanger the very existence of one of the contracting parties, a time will come when

9 For a summary of recent instances, see Fauchille, *Droit international public,* tome 1, partie III, pp. 386-388.

10 Article XIX of the Covenant of the League of Nations.

the injured party will repudiate by force its onerous and unequal obligations. Such a remedy, as advocated by Treitschke[11] and other German writers in the nine-teenth century, would build international society on insecure ground and, to use Professor Hyde's own words, "the reliance, therefore, on a change of conditions which refers merely to the development of the power of such a state to a point where it may safely ignore the terms of its agreements, is an appeal to force rather than to law."[12] Such an unhappy event no one would like to see. Put more plainly, if there is no way to adjust the unforeseen benefits reaped as a result of obsolete treaties by one of the contracting parties at the expence of the other party or parties, there is no justice, and friendly relations among nations cannot be maintained. Manifestly, the "dominant" state will insist on what it has unjustly got by force without reference to the hardship endured by the other, while the injured state will justly look for an opportunity of repudiating its unbearable obligations by strengthening and increasing its power. In fact, such a world order, resting solely upon the sword instead of the pledged word, will threaten to disturb international peace or the good understanding between nations upon which peace depends.

[11] It seemed to Treitschke that the declaration of war was the test whether the relative strength of the parties had not changed since the original conclusion of the treaty. See *Politics,* I, 28; II, 597 (translation by Dugdale and DeBille).

[12] Hyde, *International Law Chiefly as Interpreted and Applied by the United States,* Vol. II, sec. 541, p. 81.

In short, the increasing resort to the doctrine of *rebus sic stantibus* in recent years, its embodiment in the League Covenant, and the necessities of international peace and justice reveal the problem as one of such gravity and importance as to deserve most serious consideration.

## § 4. *Difficulties Inherent in the Doctrine of Rebus Sic Stantibus*

There are, however, a number of difficulties involved in any discussion of the doctrine. The first question is one which touches the very existence of the doctrine in the sphere of public international law. On this point opinions of publicists are divided. On one side, a group of writers hesitate to recognize it as an accepted rule of international law. For instance, Lammasch[13] and Bruno Schmidt[14] maintain that it is quite impossible to hold that the doctrine is an accepted principle of existing international law. A few English writers also adhere to this view. Thus Professor Brierly remarks that the doctrine is not "a statement of existing international law; it is rather a proposal to admit a new principle."[15] Lauterpacht thinks that it has never been recognized as a rule of positive international law.[16] Keeton appears to hold

[13] *Das Völkerrecht nach dem Kriege,* pp. 142-156.

[14] *Über die Völkerrechtliche Clausula Rebus sic Stantibus,* pp. 26-92.

[15] *The Law of Nations,* p. 172.

[16] *Op. cit.,* pp. 169 ff. Cf. his article entitled "Spinoza and International Law", in B.Y.I.L., 1927, p. 99. However, in the latter reference Lauterpacht admits that the Doctrine may become a rule of positive international law when resorted to by an authoritative judicial tribunal.

the same view.[17] On the other hand, Kaufmann[18] and Pfaff[19] adopt the contrary view and accept it as a rule of positive international law. However, as pointed out by Professor Garner,[20] a majority of international publicists admit it as a principle of at least international morals and public policy. Here we encounter another grave difficulty, namely, whether we shall admit it *in toto* as a part of international law and thus give the state a legal right to declare the termination of treaties deemed inappropriate; whether to do so is only a moral right;[21] whether we shall regard it as a defunct principle of civil law;[22] or consider it a dangerous dictum[23] or a pseudo-legal principle,[24] and thus expunge it *in toto* from the literature of international law.

17 *Loc. cit.*, p. 136.

18 *Das Wesen des Völkerrechts und die Clausula rebus sic stantibus.*

19 *Die Klausel Rebus sic Stantibus in der Doctrin und der Öesterreichischen Geseztgebung* (1898).

20 His artilce in A.J.I.L., *loc. cit.*, p. 511.

21 Westlake considers the right of denouncing a treaty on account of changed circumstances as an imperfect one, and thus insists that it should be exercised only with a grave sense of moral responsibility. See Westlake, *International Law*, I, 285, Lawrence regards such a right as a question of morality rather than of law. Lawrence, *Principles of International Law*, 6th edition, p. 328.

22 Thus Lammasch writing in II Strupp's *Wörterbuch das Völkerrecht*, p. 336, remarks that while the theory was dying in the civil law, international law theorists took it up and attempted to perpetuate it.

23 J. P. Bullington asserts that the doctrine of *rebus sic stantibus* "is so pregnant with danger as to outweigh any considerations of possible benefit which might be derived from it in exceptional cases." See his article entitled "International Treaties and the clause *rebus sic stantibus*" in *University of Pennsylvania Law Review*, vol. 76 (1927-28), p. 174.

24 Professor Brierly seems so to treat it. See his *The Law of Nations*, p. 174.

Secondly, admitting the doctrine to be an accepted principle in the sphere of public international law, what scope and application shall be given to it, and particularly to the basic phrase "implied conditions", upon which the validity of a treaty depends? Do the implied conditions relate only to the circumstances or conditions under which the parties were induced to conclude the treaty and which were the sole basis for the conclusion of the treaty? or do they relate also to the future welfare and development of the state in general? Do the implied conditions include only physical or material concerns? or do they cover also the conditions of moral or psychological inducement?[25] As to the scope of the doctrine, does it relate not only to inapplicable treaties which affect only the contracting parties but also to conditions whose continuance may affect the order and peace of the whole international community, as envisaged by the Covenant of the League under Article XIX? Or does it operate only in the very limited sense, as interpretated by an

[25] Cf. Wharton's statement in *Commentaries on American Law* (p. 238 note 2), in which he says that by virtue of the *clausula rebus sic stantibus* a treaty might be construed as abrogated. "To work this effect it is not necessary that the facts alleged to have changed should be material conditions. It is enough if they were strong inducements to the party asking abrogation." Pradier-Fodéré states in *Traité de droit international public* (Vol. II, pp. 1152-1153) that "respect for treaty stipulations can only last as long as the relations between the *moral* and the *material* forces of the states which concluded such treaties continue to exist." (Italics in the quotation are mine). In the report submitted by the Committee of Experts appointed by the Second Assembly of the League of Nations for the study of the application of Article XIX, the Committee seems to hold such a view that where treaties become inapplicable the circumstances include those which are either material or moral. See *Records of Second Assembly of Plenary Meetings*, 1921, p. 45.

eminent English jurist,[26] that it operates when it does operate, only in the presence of a vital change of circumstances which leads to the automatic expiration of the treaty; in other words, does it apply to deal treaties? If we accept this limited sense of the operation of the doctrine, it seems that there is no problem at all. The matter, however, is not so simple.

Thirdly, admitting that the doctrine is a well-established rule of international law and that a state has a right under the doctrine to demand revision and termination of inapplicable and obsolete treaties under certain changed conditions, then the important question arises: what are the conditions under which the doctrine may be properly applied? On this point no general rules are stated and agreed upon by international lawyers.[27] Apparently, such a question raises matters of fact, and

[26] It seems to Sir John Fischer Williams, that there is no voidable treaty under the operation of the doctrine. Whenever the supervening alteration in the surrounding conditions occurs, the treaty is void from that moment. To him, there is no need for any party to break an existing tie, but the tie itself is already broken. For this peculiar point of view see his *Chapters on International Law* (hereafter cited as *Chapters*), pp. 92 ff.

[27] For instance, it is generally agreed among writers on international law (See Oppenheim, *International Law,* 4th ed., Vol. I, p. 750; and Hershey, *Essentials of International Public Law and Organization,* 1927, p. 453 note 60) that change in the form of government does not affect the obligation of treaties; however, in the case *Lepeschkin v. Gosweiler and Co.* decided in 1923 by the Federal Tribunal of Switzerland, the Court recognized the fact that a profound alteration of internal organization of a state may result in a situation which "gives the other contracting states the right to withdraw eventually from the agreement by virtue of the principle of public law known under the name of *clausula rebus sic stantibus,* by reason of the disappearance of the state of things in view of whose existence and continuation the convention was concluded." For this case, see Hudson, *Cases on International Law,* pp. 100-102.

each case must be judged on its own merits. But writers on international law are accustomed to give us only vague and inaccurate expressions like "total", "vital", "essential" or "substantial."[28] This difficulty apparently is due to the lack of a common judge to determine, in controverted cases, whether the doctrine can be justly applied. The absence in international society of this judicial organ for the interpretation and application of the doctrine is the very point which leads most of the "positive" writers to deny the possible operation in the international community of the general principle of law which is sound and salutary in the system of municipal law, and to doubt the possibility of a jurdical solution of a controversy arising from the invocation of the doctrine, when the disputing parties fail to settle their controversies by diplomatic proceedings.[29]

Fourthly, there remains a question arising in the application of the doctrine: this is, the extent of the right or the procedure which shall be adopted by the

[28] "Such looseness of thought", remarks Foulke, "is open to serious objection, and entirely removes the principle from any possibility of accurate practical application." *A Treatise on International Law,* p. 449.

[29] See Lauterpacht, *Analogies,* p. 169 in which he states: "The existence of this judicial authority is such an essential condition for working of the juridical principle of the *clausula* that in its absence the principle itself, however, just and salutary, becomes inoperative, or when operative, ceases to be a rule of law and becomes a maxim of politics." Professor Brierly in his article, *loc. cit.,* p. 16, states that the juridical foundation for the application of the doctrine should be cautiously developed by the jurisprudence of the International Court. Even Professor Oppenheim, who admits the doctrine in principle, states that in the absence of an international court the conflict between treaty obligations and the right to be released from them cannot be settled juridically. See *op. cit.,* p. 751.

dissatisfied party—whether the doctrine gives the dissatisfied party the immediate right to denounce the treaty in question by unilaterial action whenever the changed conditions occur,[30] or whether the other party has the right to judge for itself whether the changed situation is such as to justify the claim for a release from the obligations of the treaty. In other words, does the doctrine give the dissatisfied party the right to be the sole judge of the existence of the conditions upon which the rule is based, and thus give it the right to repudiate, or denounce, or withdraw from its treaty obligations at any time of its own will? This has been done on more than one occasion and has been supported by many well-known writers. Suppose the dissatisfied party, adopting the milder view, attempts to approach the other party or parties for the abrogation of certain obsolete treaties. If such demand is refused by the other party, then a conflict arises over the treaty obligations and over the right to be released from them. In the absence of an international juridical organ, the controversy cannot be settled juridically, as we have before observed.[31] On the other hand, if it has already failed of diplomatic or political settlement, what right does the doctrine then give to the dissatisfied party?

Finally, there is a question relating to the application of the doctrine to a particular class of treaties known as treaties of peace. This question demands special attention,

[30] This appears to have been the view of Heffter, Fiore, Treitschke, Jellinek and Bluntschli.

[31] See foot note 29.

for it seems to be quite clear that most of the instances in which the doctrine has been invoked have been attempts to be released from the obligations which a state had been coerced into undertaking at a time of temporary weakness.[32] Moreover, these are the very treaties which seem to be "often most unsatisfactory and sadly in need of revision." [33] But, on the other hand, these treaties are the very treaties which are usually intended to be unequal and injurious at the time of their conclusion, to set up a permanent state of things, and to admit no other result from any change of circumstances. Should the doctrine be applied to these treaties?[34] If we answer in the affirmative there will be, as is observed by T. J. Lawrence, "an end of all stability in international affairs" if a state "were free to repudiate its engagements on that account whenever it thought fit." If not, the application of the doctrine is very limited, and its significance, as derived from principles of justice and equality, has no meaning.

[32] Thus Professor Brierly seems to hold the view that the real problem, if any, arising from the operation of the doctrine is centered around only this kind of treaty. See his article, *loc. cit.*, pp. 17, 18; and *The Law of Nations*, pp. 168-175.

[33] Hershey, *op. cit.*, p. 454.

[34] Hall seems to hold the contrary view, for he states: "A treaty, therefore, becomes voidable so soon as it is dangerous to the life or incompatible with the independence of a state, provided that its injurious effects are not intended by the two contracting parties at the time of its conclusion"; and he seems to imply the condition for the application of the doctrine only in treaties "originally consistent with the primary right of self-preservation." Hall, *International Law*, sec. 116. Most of the publicists neglect this question and remain silent when they discuss the operation of the doctrine. However, according to Professor Garner, that such treaties, intended to be injurious and established deliberately, can be terminated by the invocation of the doctrine seems to be incontrovertible. See his article, *loc. cit.*, p. 516.

## § 5. *Method, Scope and Purpose of the Investigation*

However complex and intricate the nature of the problem inherent in the doctrine may appear from the preceding discussion, the time has come for students of international law to restate and reexamine the meaning and value of the doctrine, especially in view of the increasing number of invocations of it in recent years and the embodiment of its principle in the Covenant of the League of Nations and other multilateral conventions.

Since international law is still in a formative state, the doctrine must be interpreted in the light of general jurisprudence and the existing order of the community of nations. Although the doctrine embodies a juridical principle, the soundness and judicious nature of which is universally acknowledged; yet, since the compulsory jurisdiction of an international tribunal has been wanting, the doctrine has been condemned for its laxity on account of the fact that the ascertainment of the changed circumstances in each particular case has been left to the interested parties. Consequently, although the fundamental conception of the doctrine seems clear and precise, when we come to apply it to concrete situations, a wide field is opened up for differences of interpretation. Briefly, in approaching the problem the writer has been content with a balanced statement of the general principle and a consideration of the respective merits of the particular cases in which it has been, or has been sought to be, applied.

First, there will be an examination of the doctrine in the light of the views of certain publicists. This examination will show how the doctrine has been looked upon by international publicists and in how far its principle has been accepted as a rule of international law. The writer deems it necessary to treat this phase of the subject purely and simply from the standpoint of international law. As he sees it, the termination of treaties by unilateral legislative abrogation is a question of constitutional law in the strictest sense. The question thus involved, in spite of its relation to our subject, is beyond the scope of the present investigation.

Secondly, the historical instances in which the doctrine has been invoked in diplomacy will be examined in the light of international law and in respect to the international situations then existing and the admitted principles of law and equality. Such an examination will enable us to see how the defective system of international order has permitted the doctrine to be extravagantly invoked as a mere matter of political expediency.

Finally, in view of the difficulties and the distinctive aspects of the doctrine as exhibited in its actual operation in the past, attention will be devoted, on the one hand, to the attempted political solution of the problem as suggested by Article XIX of the Covenant, and, on the other hand, to some instructive judicial cases cognate to the subject—cases taken from the jurisprudence of the World Court and other judicial tribunals. As the latter field is still almost *terra incognita* it is necessary at the

moment to say that the inquiry in such a direction is important in view of the recent progress being made in the direction of judicial settlement of international disputes, as manifested in many bilateral and multilateral treaties. Moreover, in order to restore an otherwise beneficial principle inherent in the doctrine to its proper functioning, an examination of the doctrine in the light of such judicial pronouncements is imperative.

## CHAPTER II

### The Doctrine as Envisaged by Publicists

### § 1. *A Principle in International Law*

Practically all writers on international law since Grotius, and especially those of recent years, mention the doctrine in one form or another in their treatises. A great deal of attention is devoted to the question whether a change of circumstances has any effect on the binding force of treaties which were concluded with special reference to certain contemplated conditions. Even classical writers like Grotius and Vattel, as we have seen, recognized clearly that all treaties are concluded upon the tacit condition, *rebus sic stantibus,* although they admit it only in the limited sense. Space does not allow quoting the views of all early writers on this point, but it is safe to say that a majority of them recognize the fact that all treaties are necessarily concluded under the tacit condition of *rebus sic stantibus.*[1] This

[1] Cf. Wharton, *Commentaries on American Law* (1884), p. 238 note 2; Wheaton, 8th ed., p. 353; F. de Martens (translation by Leo, 1883), pp. 510-515; Hall (6th ed.), p. 342; Klüber (2nd ed.), sec. 154; Bluntschli (translation by Lardy), Arts. 415, 460; Heffter (translation by Bergson, 1883), sec. 81; Bonfils (7th ed.), sec. 857; Taylor, sec. 394; Senate Doc. No. 31, 63d Cong. 1st Sess.; Nys (1912 ed.), II, 532; Pomeroy, *Lectures on International Law,* p. 352; and Hershey, *Essentials of International Public Law and Organization* (1927), p. 453. Cf. Bonucci in *Zeitschrift Für Völkerrecht,* 1909-10, Vol. IV, pp. 449-471. Sir Robert Phillimore, in his *Commentaries Upon International Law,* Vol. II, p. 114, mentions also that the condition of *rebus sic stantibus* is tacitly annexed to every Covenant.

indicates that writers on international law do, to some extent, recognize the fact that a change in the circumstances under which a treaty is concluded and contemplated has some effect on the binding force of that treaty. Oppenheim, for example, emphatically declares that the "vast majority of publicists, as well as the governments of civilized states, defend the principle *conventio omnis intelligitur rebus sic stantibus,* and they agree, therefore, that all treaties are concluded under the tacit condition *rebus sic stantibus.*" But, on the other hand, since there has been no competent international judicial organ to administer international law, the principle of the doctrine, though it has been well-recognized in the text books of international law, still occupies a very obscure place in that science and its principle has remained in the realm of theory.[2]

2 In the recent treatise on the subject, *Die Völkerrechtliche Clausula Rebus Sic Stantibus und Article 19 der Völkerbundsatzung* (Ferd. Dummlers Verlagsbuchhandlung, Berlin, 1931), Wolfgang Schneider, after examining the views of writers, finds no agreement among them as to the conditions under which the doctrine can be applicable and the legal consequences flowing from its application, although they are generally in accord in accepting the principle as a recognized norm of international law. Further, after an examination of the commonly cited historical cases, he concludes that the principle of *rebus sic stantibus* is not a rule of international law, but rather a political maxim. See p. 89. However Dr. Alexander Werth-Regendanz in his recent work, *Die clausula rebus sic stantibus im Völkerrecht insbesondere in ihrer Anwendung auf den Young Plan* (Gottingen, 1931) has in a convincing manner presented his view in regard to the present day force of the doctrine and its precise legal effect and applicability in the actual instances of changed circumstances affecting treaties in the past. In particular, in the latter part of this treatise he attempts to prove the thesis that, by reason of the changes occurring since the adoption of the Young Plan, the conditions requisite for successfully invoking the doctrine of *rebus sic stantibus* have been fulfilled for at least a possibly partial release from the obligations as originally imposed.

The chief objection raised by some writers to the doctrine as a part of international law centers on the point that there have been no decisions directly on the subject, rendered by competent internatonal tribunals.[3] But such an objection obviously is not valid and cannot be invoked to rule out the principle of the doctrine in the sphere of public international law. To say that there is no judicial organ or no decided cases to formulate and approve a sound and well-established principle in such a legal system as international law is simply to offer a serious criticism of the system itself. Moreover, as will be later shown, there are already a number of cases which have been decided by judicial tribunals and which give more or less juridical recognition to the doctrine under discussion.[4]

To be sure, there are objectionable features inherent in the doctrine and a considerable number of difficulties

[3] Thus Professor Brierly (*The Law of Nations,* p. 172) asserts that "the doctrine is purely a doctrine of text writers. . . There seems to be no recorded case in which it has received judicial recognition from an international tribunal. We must be cautious, therefore, of regarding the doctrine as a proposal to admit a new principle." Foulke, in *A Treatise on International Law* (Vol. I, p. 449) cynically remarks: "The doctrine of implied condition is purely judge-made, evolved to promote the doing of justice in affording redress on a contract. It is too refined for the rough jostling of independent States, and seems to have no place in the political anarchy of the international world." Sir John Fischer Williams, who generally approves the legality of the doctrine, complains: "We have no decided cases and no 'jurisprudence'." (*Chapters,* p. 87). John P. Bullington holds that the doctrine is dangerous if the binding force of treaties is left to be determined by the parties themselves unless there is an international court to decide the question at issue. See his article in *University of Pennsylvania Law Review,* vol. 76.

[4] See below, chapter V.

in its practical application, if we admit the doctrine into the sphere of public international law without reservations and qualifications. In practice, moreover, the doctrine has often been invoked to condone some wrong in regard to treaty obligations and has been abused for the purpose of "hiding the violation of treaties behind the shield of law, and of covering shameful wrong with the mantle of righteousness." But to argue that the principle of the doctrine cannot be admitted into the sphere of international law because of the danger in its invocation and because of its abuses in past practice is again to rule out many sound principles and doctrines in international law, such as the doctrine of state responsibility, simply because of the impossibility of preventing international delinquencies. In fact principle is one thing, practice is another. To rule out a sound principle merely on account of abuses in practice is unjustifiable.

The objection has also been raised that, according to the practice of states, there is no generally accepted rule as to the application of the doctrine. This view does not constitute a valid ground for the refutation of the doctrine in principle. To seek a uniform rule in the history of state practice, when states were in the state of nature, is inevitably futile. For, as has been rightly pointed out, each case has its peculiar circumstances and thus has to be judged on its own merits.[5] All in all,

[5] See Fenwick, *International Law*, p. 344; and Lawrence, *Principles of International Law*, 3rd edition, p. 289.

Sir John Fischer Williams speaks the truth when he says: "To say that it is not easy to apply this doctrine in practice or to formulate it otherwise than in very general language, is to offer a criticism invariably applicable to the propositions of a legal system, such as the international, which is in an early state of development."[6]

Finally, a few statements may be quoted to show the reasonableness of the doctrine in the sphere of international law: Thus Henry Wheaton emphatically observes that a change in circumstances upon which the validity of the treaty is made to depend, either by an express stipulation or by the nature of the treaty itself, would void the treaty even after ratification.[7] Hall states the rule as follows: "Neither party to a treaty can make its binding effect dependent at will upon conditions other than those contemplated at the moment the contract was entered into; and, on the other hand, a contract ceases to be binding so soon as anything which formed an implied condition of its obligatory force at the time of its conclusion is essentially altered."[8] Westlake states that treaties are concluded "in and by reason of special circumstances, and when those circumstances disappear there arises a right to have them

6 See A.J.I.L., 1928, vol. 22, p.90. In fact, as is well observed by M. Raoul Genet, the uncertainty of the doctrine has been due to the fact that in each instance individual writers seek to use it for the justification of violence done to the treaty and at the same time because in nature a precise, clear and partial rule could not be formulated to define human rights. See *Revue générale de droit international public,* 3rd Series, 1930, Vol. IV, p. 288.

7 *International Law,* sec. 263 (Dana's edition).

8 *International Law,* sec. 116.

rescinded."[9] Oppenheim, after pointing out the dangers and abuses of the doctrine, firmly asserts the principle that "all this cannot alter the fact that this exceptional condition is as necessary for international law and international intercourse as the very rule *pacta sunt servanda.*"[10] Finally, Fenwick explicitly admits that "publicists would appear to be correct in stating as a rule of positive law the general principle that all international contracts are entered into under certain implied conditions, which accompany the express conditions of the treaty and are equally part of the 'valuable considerations' which forms the essence of the contract."[11] Other statements like these might be quoted, but suffice it to say that most of the publicists approve the principle contained in the doctrine that all international contracts are entered into under certain implied conditions, which form the very basis of the contract and are equally part of the express conditions of the treaty which form the essence of the contract.[12]

[9] *International Law,* Vol. I, p. 295.

[10] Oppenheim, *op. cit.,* p. 748.

[11] *Op. cit.,* p. 344.

[12] Even Schmidt, a confessed opponent of the doctrine, could not help recognizing it as morally justifiable. See Über Die *Völkerrecht Clausula Rebus Sic Stantibus,* pp. 26-92. In fact, Schmidt admits that the doctrine may be invoked under two conditions: first, there must be a tacit understanding between the parties to the agreement that the essential circumstances must remain the same for the contract to remain alive; second, the agreement must have as a basis a judgment that certain results will flow from it. Schmidt's judgment was later found to be incorrect. Moreover, he admits the fact that the *clause* was well developed and often invoked. In short, though he adheres strictly to the rule of *pacta sunt servanda,* he has to admit the exceptions which are sufficient to constitute a rule to the contrary. See *op. cit.,* p. 160. Lammasch in *Das Völkerrecht nach dem Kriege, pp.*

## § 2. *Interpretation of the Scope and Conditions*

Grotius and Vattel admitted the doctrine in only a limited sense. Thus, Grotius limited its application to cases in which it is patently clear that the original circumstances were the cause of the consideration of the contract, or in other words, the existing state of things was the sole cause of the agreement.[13] Vattel admitted it in cases in which the state of things alone was the chief consideration of the promise and essential to the promise. Only by a change of that state could the effect of the promise be lawfully prevented or suspended.[14] G. F. von Martens, who wrote in 1858, also stated that a "total change of circumstances which, at the time of making the treaty, had the force of condition, renders the con-

142-158, uses every possible argument to prove that the doctrine is not and has never been a recognized rule of customary international law, but attempts to prove (pp. 159-171) that treaties of alliance and guarantee are not binding; i.e., they are necessarily concluded according to the principle of *rebus sic stantibus* (p. 170). For these views of Schmidt and Lammasch, see Oppenheim, *op. cit.*, p. 747 note 3. Kaufmann, who made the doctrine a special study, also arrives at the same conclusion as Professor Oppenheim's that the power of denouncing a treaty obligation by unilateral action constitutes an infraction of one of the fundamental principles valid for internatiosal law (i.e., *pacta sunt servanda*); but such an infraction is by its *raison d'être* necessary to the peaceful coexistence of human beings. Kaufmann, *Das Wessen des Völkerrechts und die Clausula Rebus sic Stantibus,* p. 196. In answering the objection that the principle of the doctrine is perilously lax, Pitt Cobbett, a noted English jurist, rightly maintains "that some such rule would appears to be an inherent necessity, and that to pronounce any treaty binding for all time despite such change of conditions would strain the principle of the sanctity of treaties beyond the breaking point, and probably imperil it in other cases." See his *Leading Cases on International Law,* 4th edition, Vol. I, p. 340.

13 Grotius, *De jure belli et pacis,* Book II, Chap. XVI, sec. 25.

14 Vattel, *Le droit de gens,* Book II, sec. 296.

tract no longer obligatory, and when the object of the treaty ceases to exist, the treaty cesses also."[15] Klüber, who wrote in 1831, declared that "treaties cease to be obligatory with the change of such and such circumstances whose existence is supposed to be necessary to both the parties. The clause of *rebus sic stantibus* is understood whether it is expressly stipulated or results from the nature of the treaty itself."[16] The doctrine, according to the view of Sir Robert Phillimore, means "when that state of things which was essential to, and the common cause of, the promise or engagement has undergone a material change, or has ceased, the foundation of the promise or engagement is gone, and their obligation has ceased."[17] Wharton mentioned, as one of the instance in which the rule of *rebus sic stantibus* applies, the case in which the reason for a treaty has failed.[18] Pradier-Fodéré maintains that the doctrine is applicable when there has been "essential modification of the circumstances in view of which the treaty had been concluded."[19] Bonfils lays down as the accepted doctrine the principle that "a treaty should without question come to an end when the causes which gave rise to it have disappeared"[20] Despagnet, the celebrated French jurist, states that one of the cases in which the denunciation of treaties is legitimate is "when the circumstances which have given

[15] *Law of Nations* (Cobbett's translation, 4th ed.), p. 352.
[16] *Europaisches Völkerrecht* (2nd ed. by Morstadt, 1851).
[17] *Commentaries upon International Law* (3rd ed. 1882), Vol. II, p. 114.
[18] *Digest of International Law*, Vol. II, sec. 137a.
[19] *Traité de droit international public*, Vol. II, p. 927.
[20] *Manuel de droit international publique*, sec. 857.

rise to the treaty have changed and deprived the old agreement of its reason for existence."[21] Wilson says, "A treaty which has not come to an end in accord with its own provisions and has not been dissolved may be void, if it depends upon a condition which has ceased to exist, by the complete destruction of the thing which forms the object of the treaty. . . ."[22]

Thus far, it will be seen that the views of publicists on international law limit the scope of operation of the doctrine to a change of circumstances such as were the sole cause of the conclusion of the treaties and which were the basis of the existing state of things when the contracting parties contemplated the treaties. Thus viewed, only occurrence of a change in such circumstances gives the dissatisfied party the right to demand release from the obligations. Since the *raison d'être* of the treaty is gone, the obligatory force of the treaty ceases. But a second question comes up : To what extent can the change of such circumstances be invoked as a legitimate claim by the dissatisfied parties? Upon this point, writers are accustomed to state their views, as already pointed out, [23] in very vague terms. Such vague and misleading expressions as "vital", "essential", and

[21] Quoted from Woolsey's article in A.J.I.L., vol. 20 (1926), p. 348. Professor Woolsey himself remarks that one of the changes which are regarded by authorities as fundamental or vital is "to take away the very foundation of the engagement; that is, its *raison d'être*." *Ibid.*, p. 349.

[22] *Handbook of International Law*, 1910, p. 210.

[23] As Heinrich von Cocceji pointed out long ago (in 1699), opinions differed among ancient jurists as to the real description of the doctrine in question. See Cocceji, *Disputatio juridica inauguralis de clausula rebus sic stantibus*, p. 8.

what not, give us no exact idea of what is meant; consequently, such looseness of expression causes uncertainty in the doctrine as to its possible application. However, there are certain publicists who give us some ideas in regard to the extent of change under which the doctrine can be legitimately invoked. For the sake of clearness these may be grouped under the following headings:

First, it is maintained by writers on international law that the change must be such as to make the performance of treaties is practically impossible. Vattel illustrates the possibility of this situation very vividly. He depicts the problems confronting a sovereign, who in the time of peace promises to send succor to an ally; but before he can do so, war breaks out in his own territory. If his promise is fulfilled, it will leave him defenseless. Another example cited by him is that of a state which promises to furnish its neighbor with certain articles, but before it can do so, subsequent unforeseen circumstances render the fulfillment of the obligation impossible, either on account of its own need of the articles or of the shortage of such articles.[24] Pufendorf expresses his views on this point as follows: "No one can bind himself to what is for him impossible. If, however, a thing considered possible at the time of entering the agreement has later by some chance become impossible by no fault of the contractor, if nothing has yet been done, the contract will be void."[25] He defines

[24] *Op. cit.*, sec. 296. For other possible cases of impossible performance of treaties cited by authorities, see Pouritch, *De la clause rebus sic stantibus en droit internatonal public*, sec. 4, pp. 72 ff.

[25] *De officio hominis et civis libri duo*, p. 53.

two sets of impossible conditions, those rendering the contemplated action physically and those rendering it morally impossible; since "some things cannot in the nature of things be done and some ought not to be, as contrary to laws and morality."[26] Even Wildman, a confessed opponent of the doctrine, who asserted that the obligations of treaty cannot be affected by change of circumstance, admits it to be necessary "if the breach of a condition renders the performance of it impossible."[27] Wharton expresses the view that the doctrine may be applicable when "there has been such a change of circumstances as to make its performance impractical except at an unreasonable sacrifice."[28] Rolin-Jaequemyns, an author of great merit and distinction, who wrote in 1887, held that a change of circumstances which makes the execution of a treaty either morally or materially impossible, may justify an *ex parte* denunciation of it.[29] Professor Olivi writing in 1891 says that a change of circumstances may justify the denunciation of a treaty if an important change of that character renders the execution of the instrument impossible, or if executed, would endanger the life of a state.[30] Mérignhac observes that "when there arrives a time when the social relations change in such an extreme manner that the execution of treaties becomes *ipso facto* impossible; the treaties

[26] Pufendorf, *op. cit.*, pp. 54-55.

[27] *International Law*, p. 175.

[28] *Digest*, Vol. II, sec. 137a.

[29] See *Revue de droit international et de législation comparée*, Vol. XIX, p. 46.

[30] See *ibid.*, Vol. XXIII, p. 602.

following such changes fall and disappear with the disappearance of the time and circumstances."[31] Professor Garner remarks: "The change of circumstances must be such as either to render the execution of the treaty difficult or impossible or to entail the performances of obligations which were not foreseen by the contracting parties and which, had they been foreseen, would never have been assumed."[32]

Secondly, writers on international law have recently advanced the theory that the change of circumstances by which the dissatisfied party can legitimately claim to be released from the obligation must be of such an extent that the performance of the treaty obligation will threaten the very existence or the independence of the state. They conceive that the primary duty of a state is self-preservation. No state will consent, except under duress, to such a treaty as will hinder the fulfillment of this duty. To illustrate this point, a few statements by highly respectable authorities may be quoted. Thus, Hall states the rule as follows: "a treaty therefore becomes voidable so soon as it is dangerous to the life or incompatible with the independence of a state."[33] Oppenheim, who contributes so much on this point, observes, "when the existence, or the vital development, of a state stands in unavoidable conflict with its treaty obligations, the latter

[31] *Traité de droit international public* (Paris, 1907), t.ii, p. 670.

[32] *International Law and the World War,* Vol. II, sec. 449, p. 218.

[33] Hall adds, however, one reservation to this statemett; i.e., "provided that its injurious effects were not intended by the two contracting parties at the time of its conclusion." Hall, *op. cit.,* 7th edition, p. 368.

must give way, for self-preservation and development, in accordance with the growth and the vital requirements of the nation, are the primary duties of every state." He continues: "the consent of a state to a treaty presupposes a conviction, that it is not fraught with danger to its existence and vital development. For this reason every treaty implies a condition that, if by an unforeseen change of circumstances an obligations stipulated in the treaty should imperil the existence or vital development of one of the parties, it should have a right to demand to be released from the obligation concerned."[34] Wilson and Tucker state that a treaty is voidable "when the conditions threaten the self-preservation of the state or its necessary attributes."[35] Pradier Fodéré after stating the necessity of recognizing the right of a state to declare itself freed from any suicidal engagement remarks: "though a state may be required to execute burdensome engagements contracted by it, it cannot be asked to sacrifice its development and its existence to the execution of a treaty."[36] Despagnet, classifying one of three legitimate cases in which the denunciation of treaties is justified, considers it justified "when the observance of the treaty has become dangerous for the political or economic existence of a country."[37]

[34] *Op. cit.*, 4th ed., p. 748.

[35] *International Law*, 2nd ed., p. 218.

[36] *Traité de droit international public européen et americain.* Quoted from Woolsey's article in A.J.I.L., vol 20 (1926), p.348.

[37] See Woolsey's article, *loc. cit.*, p. 348. Professor Woolsey himself lists such changes as legitimate which tend to "threaten or cause the sacrifice of a state's development or its vital requirements for political or economic existence to the execution of the treaty; that is, they make performance impracticable except at an unreasonable sacrifice and which are inconsistent with the right of self-preservation or incompatible with the independence of the State." *Ibid.*, pp. 349-50.

Finally, Professor Garner remarks: "the change must be such as to make the continued performance of the obligations flagrantly inequitable, unjust, oppressive, difficult of performance, or derogatory to the dignity or sovereignty of one of the parties."[38]

It remains now to determine what are the implied conditions upon which the obligatory force of every international agreement depends. Upon this writers on international law seem to agree on the following points: First, it is generally conceded that one of these conditions is that a treaty should be observed by both of the parties to it. This principle is clear and precise. The question, however, remains whether a treaty is rendered voidable by the occurrence of any breach, or whether its voidability depends upon the breach being of a certain kind or magnitude. To warrant this denunciation, it is agreed, in principle at least, that the breach must be such as to affect one of the main objects of the treaty, or such as to deprive the other contracting power of some advantage which constituted a material inducement to the making of the treaty.[39] Secondly, it is commonly agreed that an implied condition of the continuance of the obligatory force of a treaty is that it shall remain consistent with the right of self-preservation. This rule is logically

[38] See his article in A.J.I.L., vol. 21, 1927, p. 513. Kaufmann, after a detailed study of the doctrine expressed the view that the right of independence is inalienable and cannot be renounced by other state. "It is true that sovereignty can be limited by restrictions to a considerable extent; but it never can be limited to such a point that it ceases to be a sovereign state." Kaufmann, *op. cit.*, p. 196.

[39] See Hall, *op. cit.*, Sec. 116, and P. Cobbett's *Cases*, 3rd ed., p. 328. According to Hall, a test may be found in the main object of a treaty.

deducible from the general principle that a state cannot be expected to sacrifice its very existence to uphold its treaty obligations. Finally, "it is also an implied condition of a treaty that the parties to it shall keep their freedom of will with respect to its subject matter except in so far as the treaty is itself a restraint upan liberty."[40]

These are the generally accepted views of the more moderate publicists. However, there is a group of radical writers[41] who assert that the state has an undoubted right to repudiate treaty obligations whenever, in its own opinion, the obligations conflict with its national interests. But such an extreme view can hardly be defended as a general rule for the application of the doctrine, and tends to discredit the doctrine instead of creating a general presumption in its favor.[42]

## § 3. *Extent of the Right*

In regard to the question as to what right a state may have under the operation of the doctrine when a change of conditions permits a demand to be released from

[40] See Hall, *op. cit.*

[41] See Fiore, *Nouveau droit international public* (Paris, 1896), Vol. I, p. 466; Heffter, *Das Völkerrecht,* sec. 98; Hautefeuille, *Droit et devoirs des nations neutres;* Bluntschli, *Das Moderne Vökerrecht der Civiliserten Staten als Rechtbuch Dargestellt,* sec. 415, and cf. his *droit international codifié,* secs. 415, 460; Treitschke, *Politics* (English translation by Dugdales and Torben de Bille), Vol. I, pp. 29, 96, and Vol. II, p. 597; Jellinek, *Die rechtliche natur der Staatsvertrage,* sec. 62 ff., and Liszt, *Völkerrecht,* p. 186.

[42] For general criticisms on their views see Hall, *op. cit.,* 7th ed., p. 370; Taylor, *International Public Law,* p. 402; Williams, *Chapters,* p. 88; Garner's article, *loc. cit.,* pp. 512-513. For special criticism of Treitschle's view, see Dupuis in *Recueil des cours* (1924), I, p. 344.

treaty obligations, those radical writers just referred to hold that a state, under such circumstances, has an absolute legal right to denounce the treaty, or declare it obsolete and no longer binding without necessarily obtaining the consent of the other party or parties. This was done by Russia in 1870 and 1886, by Austria-Hungary in 1908, and by Germany in 1914. But such practices have been condemned by international declarations and governmental protests. And this view has been rightly opposed by recent and contemporary writers on international law.[43]

It is more correctly maintained by recent authorities that the doctrine gives the dissatisfied party merely a right to demand a release from such obligations.[44] The first step, they argue, for the dissatisfied party to take in such a case is to approach the other party, setting forth the reasons why the treaty should be revised or terminated, and requesting the latter's reconsideration before abrogating the treaty itself. Thus, Sir Walter Phillimore states the rule as follows: "the state which is about to suggest that the treaty is no longer binding should give ample notice before action, so that other states may adapt themselves to the altered condition of

[43] Compare the views of Professors W. C. Dennis, J. P. Chamberlain, J. W. Garner, C. G. Fenwick, P. C. Jessup, J. S. Reeves and Q. Wright expressed in the Twenty-sixth Annual Meeting of the American Society of International Law. See *Proceedings of the Society*, 1932.

[44] Professor Oppenheim, representing this view, remarks, "the clause *rebus sic stantibus* ought not to give a state the right, immediately upon the happening of a vital change of circumstances, to declare itself free from the obligations of a treaty." *Op. cit.*, p. 751.

things. To use diplomatic language, there must be a prior denunciation of the treaty."[45] In connection with both the power to denounce and the necessity of notice, Calvo says: "When the circumstances are changed and the contracting parties cease to be in accord, one of the contracting parties, whose interests have suffered or who wishes determinately to break the conventional ties, is required to notify the other by writing or verbally, but in an express manner, of its intention to let the treaty expire. Such notification is called denunciation. When this denunciation is based on earnest good reason the denunciation is justified by itself and it would not be considered as offensive conduct or an insult to the other party who receives this denunciation."[46] Oppenheim observes: "when a state is of the opinion that the obligations of a treaty have, through a vital change of circumstances, become unbearable, it should first approach the other party or parties, and request them to abrogate the treaty."[47]

It is agreed by some high authorities that, if ample notice be given beforehand and the demand is refused, the

[45] *Three Centuries of Treaties of Peace,* p. 138.

[46] *Le droit international,* III, p. 403.

[47] *Op. cit.,* p. 751. For other references on this view see: Westlake in *Revue de droit international et de législation comparée,* 1901, p. 394; Rolin Jaequemyns, "La Question d'Orient en 1885-1886," *ibid.,* 1887, pp. 37-46; Pasquale Fiore, *Trattato di diritto internationale publico,* II, ss. 1040, 1941; Fauchille, *op. cit.,* I, pt. 3, p. 384; Bonfils, op. cit., sec. 857; Rivier, *op. cit.,* II, p. 129; Pouritch, *op. cit.,* sec. 5, pp. 78-82; Woolsey's article, *loc. cit.,* p. 350; Garner's article, *loc. cit.,* p. 515. Nys in *Le droit international* (*Paris-Bruxelles,* 1906), Bry in *Précis élémentaire du droit international public* (Paris, 1880), and Merignhac in 1 *Traité de droit public international* held the same view.

dissatisfied party, under necessity of being released from the unbearable obligations, and in the absence of an international court, may be justified in declaring its release from the obliggation by unilateral action.[48]

## § 4. *Treaties of Peace*

Writers on international law are reluctant to discuss the problem whether the change of circumstances has any effect on treaties which are concluded under duress or after defeat in a war, and which are intended to be permanent and perpetual in character, unequal in terms, and injurious in spirit. They neglect it, not because they do not realize the importance of the problems, but because they perceive that it is rather complicated and delicate. Most publicists are inclined to think that international law is too weak in its present state to deny the validity of a treaty entered into under duress or coercion, or to lay down canons of international public policy for the safeguarding of the international order in general; or in other words, so far as the law still recognizes war as a legitimate means of redressing the observance of treaties imposed by force as valid as those freely entered into, it seems that there is no hope of contriving any means for the solution of the problem. But the problem is, in fact, too grave and too serious to

[48] See especially: Phillimore, *op. cit.*, p. 138; Oppenheim, *op. cit.*, Vol. I, p. 751; Woolsey's article, *loc. cit.*, p. 450; and Garner's article, *loc. cit.*, p. 515. Cf. Pouritch, *op. cit.*, p. 83. Scelle, in 20 *Revue générale le droit international public,* p. 490, remarks that "in such a case the complaining state ought first to endeavor to come to an agreement with its co-signatories; but if it cannot convince them that the principle of *rebus sic stantibus* requires a modificaton of the treaty, it is no longer bound to consider the treaty as binding upon it and it may therefore denounce it."

remain untouched. Nearly all the instances in which the doctrine has been invoked were due to the claim of one of the parties to be released from the oppressive obligations imposed upon it after a defeat in war. Moreover, it has been only in such cases that the possibility of reconciling the conflict between the rights of the victorious parties under the rule of *pacta sunt servanda* and the rights of the aggrieved party under the doctrine of *rebus sic stantibus* has been insurmountable. In this dilemma both parties insist on their respective rights until the defeated party is able to repudiate the obligations by force;[49] in other words, the vital change of circumstances, as observed by Treitschke and other German nationalists in the nineteenth century, is the subsequent recovery of strength by the oppressed state which had been coerced into undertaking onerous obligations at the time of the temporary weakness.

Attention may be devoted for a while to the views of publicists who have given some opinion on the question of whether changes of circumstances have any effect on that group of treaties commonly known as treaties of peace. Lawrence would seem to justify the action of the vanquished state if there really has occurred a vital change of circumstances. For he mentions that no one will go to the length of maintaining the enforcement of the treaties of Münster or of Utrecht and the stipulations

[49] As remarked by Buell: "The history of the world has been filled with treaties imposed on defeated Powers at the end of Wars, the injustices of which have been remedited only by the use of force when the vanquished Power has sufficiently recuperated." *International Relations* (1925), p. 629.

enacted at Vienna after the downfall of Napoleon I, and remarks, "as circumstances alter, the engagements made to suit them go out of date." When, however, he comes to the question of the conditions under which such acts are justified, he admits that such a question is a question of morality that transcends the sphere of law. In short, he admits that the vanquished state has, at best, only a moral right to demand release from such oppressive obligations.[50] The position of Hall is clear when he expresses the opinion that the implied condition of the continuance of the obligatory force of a treaty is that it be originally consistent with the primary right of self-preservation. Presumably he means that invocation of the doctrine can be justified only in cases in which the obligations of the treaty were really intended by the parties at the time of its conclusion to be consistent with self-preservation. Put in other words, the doctrine is not applicable in case of obligation imposed by treaties of peace which are intended to be inconsistent with the self-preservation of the vanquished party.[51] Oppenheim's opinion is a bit vague. He does not state clearly whether the principle of *rebus sic stantibus* can be applied in the case of treaties of peace. He defends the doctrine only in general terms, saying that "no state would consent to any such treaty as would hinder it in the fulfillment of its primary duties." "The consent of a state," he observeres, "to a treaty presupposes a conviction that it is not fraught with danger to its existence and vital

[50] Lawrence, *Principles of International Law*, 4th ed., sec. 134.
[51] Hall, *op. cit.*, p. 368.

development."[52] It is difficult to see how these statements can be applied to treaties of peace, which are usually intended to be "fraught with danger to the existence and vital development" of the vanquished party, if Oppenheim, as the writer understands him, really limits the basis of the application of the doctrine to the primary intention of the parties at the time of the conclusion of the treaties.

Brierly perceives the difficulty and importance of the problem arising from oppressive treaties,[53] but persists in thinking that the doctrine of *rebus sic stantibus* does not attack the root of the evil resulting from such treaties,[54] but only gives us, at most, a symptom of the importance of the problem and prepares the way for its solution. Besides, he thinks that the problem cannot be solved by juridical means and that the only solution lies in the function of "some international quasi-legislative action comparable to the legislative interferences which modify the obligations of private contracts within a state in the interests of social order."

The real difficulty of the problem of oppressive treaties, as already indicated above, is due to the fact

[52] Oppenheim, *op. cit.*, Vol. I, p. 748.

[53] See *The Law of Nations*, pp. 168-175; and his article in *Transactions of Grotius Society*, Vol. XI, esp. p. 19.

[54] For he thinks the possible juridical basis for the doctrine *rebus sic stantibus* rests on the implied term or intention of the parties, but in the case of treaties of peace, which are intended by the parties to create permanent obligations and to be unaffected by a change of circumstances, it can be only slight use towards solving the difficult problem resulting from such treaties. See his article, *loc. cit.*, p. 16.

that international law, at its present stage, still remains unable to establish a distinction between treaty obligations voluntarily entered into and those imposed by coercion or duress, and hence still persists in stating indiscriminately the sanction of all treaty obligations.

But however reasonable the excuse may be it is impossible to assert that treaties of peace can be maintained as permanent and perpetual. Even in systems of municipal law, equity and common law recognize that changes of circumstances or conditions affect, to a great extent, the validity of contracts. It is rightly asked if vital changes of circumstances can change positive law, why, in the system of international law, cannot a change of circumstances affect treaty obligations?[55] Treaties and conventions are of course made to be observed, whether entered into freely or under duress. But international law is made for nations, not nations for international law. If international law holds that no change of circumstances, however vital or fundamental, can affect treaty obligation, and insists too rigidly on the binding force of obsolete treaties, it simply neglects the fundamental principle of natural growth and development of states and leaves a loophole in the system which defeats its own purpose by encouraging treaty violations. Moreover, since international law rests its postulates upon the principle of equality and sovereignty of states, if it does not recognize the right, moral or legal, of a state to be released from onerous and unjustifiable obligations

[55] See Oppenheim, *op. cit.*, Vol. I, p. 748.

when the other party refuses to consent to modification, abrogation or replacement, it simply means that the fundamental postulates upon which the system has built up its precepts have no meaning in practice. Fortunately, this problem was foreshadowed by the authors of the Covenant of the League when they formulated Article XIX of the Covenant. But whether this Article is the satisfactory solution or not still remains, as will later be seen, a doubtful question.[56]

## § 5. *Recent Legal Interpretations of the Doctrine by English Writers*[57]

In more recent years English writers on international law have attempted to find a juridical basis for the doctrine by recourse to the analogy of the doctrine of

[56] However, it should be observed here that the Geneva Protocol of 1924 seems to fortify the position that the *status quo* established by Treaties of Peace cannot be changed even by force. For criticism of this Protocol see Buell, op. *cit., pp.* 626-627. On the other hand, the non-ratification attitude of Great Britain and certain other states towards the Protocol should be observed too. It is said o be one of the main causes for the non-ratification of the machinery of Article XIX for the purpose of preventing the stereotyping of the territorial *status quo* which the Protocol would tend to bring about. Upon this point, see Oppenheim, *op. cit.,* p. 343, note 2.

[57] See Brierly, *The Law of Nation,* pp. 173 ff. and his article, *loc. cit.*, pp. 15 ff.; Sir John Fischer Williams, "The Permanence of Treaties" in A.J.I.L., vol. 22 (1928), pp. 89 ff., and MacNair's lecture in *Recueil des cours,* 1928, II, pp. 474 ff. Cf. Lauterpacht, *Analogies,* pp. 173 ff.; and McKinnon, *The Effect of War on Contract* (1917). Charles Fairman, in his recently published article entitled "Implied Resolutive Conditions in Treaties" appeared in A.J.I.L., vol. 29 (1935), pp. 219-236, examines to a considerable exent the principle of frustration in connection with the doctrine of *rebus sic stantibus.*

frustration[58] in municipal law which has been developing in England during the last half century. For the sake of conciseness attention will be confined to the views expressed by Sir John Fischer Williams,[59] according to which the doctrine is in essence a legal principle, and may be properly included within the pale of international law. But, strictly limited by its legal nature, the doctrine, like the doctrine of frustration in municipal law, does not give any one of the parties the right to set up any condition whatsoever as a justification for a repudiation of its treaty obligations. He states briefly that it is not a doctrine that one state may by unilateral declaration rescind or modify its obligations. What leads Williams to think that there is no need of abrogating a treaty by

[58] The doctrine of frustration in municipal law was concisely stated by Justice Russell in *In re Badische Company, Limited* (1921): "If the supervening events or circumstances are such that it is impossible to hold that reasonable men could have contemplated that event or those circumstances and yet have entered into the bargain expressed in the document, a term should be implied dissolving the contract upon the happening of the event or circumstances." See (1921) 2 ch., at p. 379. The principle of the frustration of the objects of a contract was first laid down by Justice Blackburn in the well-known case of *Taylor v. Caldwell* (1863) 3 Best and Smith p. 836 in which he stated the rule as follows: "Where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the permanence of his contract has become unexpectedly burthensome or even impossible." For further references on the doctrine of frustration, cf. *Hirji matji and others v. Cheong Yue Steamship Co., Limited* (1926) A.C. p. 509; so also the cases connected with the postponement of King Edward VII's coronation, discussed in *Pollock on Contracts,* 8th ed., p. 439. For the discussion of Frustration of Contract, see McNair, "War Times Impossibility of Performance of Contract," in *Law Quarterly Review,* XXX, 1919, pp. 84-100 (reprinted in *Legal Effects of War,* Cambridge, 1920).

[59] See his article, *loc. cit.*

unilaterial action is simply that, according to the doctrine of frustration,[60] the rule of *rebus sie stantibus* may be explained in either of two ways: Either it may be said "that the treaty, so far as it remains executory (for executed provisions are not affected), is avoided because it must be construed as containing an implied stipulation that in the event of a change of essential conditions it ceases to be binding as from the date of the change, or we may say that *naturaliter,* from the very nature of the case, a contract made with reference to certain conditions disappears when the conditions are gone."[61] In short, the doctrine has effect only on what the parties themselves have intended or on what we may call the natural result of the bargain. Consequently, the question at issue, according to this Anglo-Saxon lawyer's viewpoint, should be decided by construction of the treaty *ab initio* and not by forcible action *ab extra.*

Such an interpretation of the doctrine simplifies our problem to a large extent, for it limits strictly the scope of the operation of the doctrine to the implied intention of the parties and offers us a somewhat juridical basis for the interpretation of the doctrine. But a moment's

60 However, McNair expresses doubt as to such analogy by stating that: "The *clausula rebus sic stantibus,* though having certain analogies in Anglo-American rules regarding supervening impossibility, would have a devastating effect in the common law of contracts." He observes that "the true danger of the analogous application of rules of private law to the relations of states lies in the existence of the doctrine of State Sovereignty." See his "So-called State Servitudes", in B. Y. I. L., 1925, p. 122. Cf. Oppenheim, *op. cit.,* Vol. I, p. 753, foot note 3: "It is suggested that the basis of the doctrine of frustration is probably mistake."

61 Williams' art., *loc. cit.,* p. 93.

contemplation leads to doubt as to the practical application of the doctrine under such an interpretation of treaty obligations among states in the present age. First of all, if we follow the first explanation of the doctrine—that is, the implied intention of the parties—it certainly leaves a group of important treaties untouched, namely, treaties of peace.[62] According to the true conception of the doctrine of frustration, the contract is dissolved only "if an implied term can be fairly read into the contract itself to the effect that it is to be dissolved in the event that has happened."[63] Therefore, the operation of the doctrine depends entirely on the intention of the parties to the contract. But, as we have already seen, in the case of treaties of peace, we can hardly read into the terms of such treaties any meaning which would justify one party to defeat that intention. Lord Parker perceived this difficulty of strict interpretation[64] of the implied intention regarding the operation of the doctrine of frustration in the case of *Tamplin Steamship Co. v. Anglo-Mexican Co.,* wherein he said,

62 Williams thinks that the problem of oppressive treaties, though it is not within the competence of the legal doctrine of *rebus sic stantibus* to deal with it, may be dealt with appropriately by international legislative action, which has been attempted by the League of Nations in Article XIX. Here he clearly indicates that the ground covered by Article XIX is not that of the doctrine of *rebus sic stantibus.* See his recent work, *International Change and International Peace* (Oxford, 1932). Cf. the same view held by Professor Brierly regarding the solution of the problem of oppressive treaties in his *Law of Nations,* p. 175; and Lauterpacht, *op. cit.,* p. 174.

63 See Brierly, *Law of Nations,* p. 173; and the decision of *In re Badische Company, Ltd.,* cited above in foot note 58.

64 However, Williams interprets (his art., *op. cit.,* p. 89) the changed conditions under which the doctrine operates to include material as well as moral facts. If the moral facts are admitted as implied conditions, then the difficulty of strictly literal interpretation might be prevented.

"it is of course impossible to imply in a contract any term or condition inconsistent with its express provisions, or with the intention of the parties as gathered from these provisions."[65] Moreover, even though Williams recognizes the rule as a legal doctrine, when he comes to the question as to how the doctrine is to be applied, he hesitates to admit that it can be practically applied by the Permanent Court of International Justice which is supposed to handle international legal questions. For he thinks most of the questions arising from the application of the doctrine in actual cases would be questions of fact and mixed fact and law which could not be decided by an international tribunal whose jurisdiction is limited by the language of Article 36 of the Statute. It seems to him that such questions can be decided only by a board of conciliation composed of men of common sense who will decide the questions as equity demands.[66]

Another difficulty is found in his second explanation of the doctrine—that is, expiration of the treaty by natural consequence—when we come to concrete cases. For instance, he states that the doctrine may well be applicable to treaties conferring extraterritorial jurisdiction, for the basis of such treaties is the existence of judicial systems which are in essence different in character. When the country granting such privileges has advanced sufficiently in judicial and administrative organization to render the existence of the system unnecessary, the treaty

[65] (1916) 2 A. C., at p. 422. Quoted from Professor Brierly's article in *Transactions of Grotius Society*, 1926, p. 16.

[66] Williams' art., *loc. cit.*, pp. 100-101.

becomes obsolete and thus ceases to be binding. But practical questions arise. At what moment does the treaty become obsolete? Who is empowered to declare the obsolesence of the treaty in question? Since the aggrieved state has absolutely no power at any time, or rather, no need of using such power, according to Williams' view, to declare obsolescence of treaties by unilateral action, then, so far as there is disagreement existing in regard to the interpretation of the extent of the change of conditions which may render the treaty obsolete between the two parties or several parties, there is no possibility that the treaty will die a natural death. Consequently, if this inference is right, what Williams actually means is that the decision as to whether the treaty is obsolete or not is a matter which concerns not one party but both. Since the matter hinges on the attitude of the "dominant power", so to speak, it amounts to saying that the avoidance of the treaty does not automatically follow such a change of circumstances, and does not take place at the will of one of the parties, but at the will of some one else! Such an interpretation scarcely gives us a satisfactory solution of the problem when there is disagreement regarding the interpretation of changed conditions. Moreover, he does not give us a clear view of what he really means by an automatic expiration of a treaty upon a supervening alteration of event.[67]

[67] To the writer's understanding Williams means that, after the occurrence of a change of circumstances, the treaty is automatically gone or dies a natural death. See *loc. cit.*, pp. 90, 94. But can China, for instance, assume the position that the system of extraterritoriality is gone, if she can rightly maintain that her judicial system has been changed since the days of the

On the other hand, such a juridical explanation of the doctrine as Williams expounds has, however, its own purpose and merits, and offers a beneficial remedy for the abuse and extravagance of the doctrine practiced by some states during the past few decades. Thus Williams' theory would seem to correct such extreme views of the doctrine as those advocated by some German radical writers in the nineteenth century, according to which a state has an undeniable right to repudiate its treaty obligations without first setting forth reasons and approaching others for mutual agreement, whenever it seems inconvenient to undertake or fulfil such obligations. This strictly legal view of the doctrine seems, moreover, to put a strong check upon cases in which the doctrine has formerly been pleaded on other than necessary grounds and in which it was put into practice by warlike actions under the shield of law. But, whatever beneficial element the explanation may possess, the world-order has not yet become sufficiently legally organized to give us an international judicial organ competent to interpret such a legal doctrine and to terminate, or cause the automatic expiration of, such obsolete treaty obligations, and thus relieve the aggrieved state from the necessity of approaching the other party or parties for a new agreement. History, in fact, teaches us, as will later be shown, that in most of the instances in which changed circumstances

conclusion of such treaties with the Powers? Apparently, she has not been allowed to do so! See the attempts China has made since 1902. In fact, as Dr. Wang declared at the Washington Conference, the question as to whether or not the state of China's laws has attained the standard to which she is expected to conform is a matter of opinion only. See Willoughby, *China at the Conference* (Johns Hopkins Press, Baltimore, 1922), p. 115.

demand readjustment of treaty rights and obligations the states interested do not come to an agreement as to whether such a demand is justified or not.[68] It was probably due to the absence of a competent court to adjust international differences arising from treaty obligations that the aggrieved state under extreme necessity and under certain conditions is justified in using a doubtful right such as that of "denunciation."[69]

[68] Williams himself perceives this difficulty. See Williams' art., *loc. cit.*, p. 96.

[69] *Ibid.* Williams seems to admit such a limited right, for he quotes a case, in which the French provisional government denounced in 1848 the unilateral prohibition against the fortification of Huningen in Alsace imposed on France by the Treaty of 1815, as a particular instance to which the doctrine may be well applied. *Ibid.*, p. 95.

## CHAPTER III

### Diplomatic Instances

### § I. *How Far Precedents of State Practice can be Employed as a Basis for the Interpretation of the Doctrine*

Up to the present time the basic principle underlying the practice of states is their sovereign wills. In that respect states are in the state of nature in their relations to one another. Since they are in the state of nature, or, to use the famous saying of Hegel "the relation between States is a relation of independencies",[1] their rights and obligations cannot be created by any stipulations except through their own express consent. In other words, there has been no other law for the state but the purpose of its own will. From this premise it is argued that the rights and obligation created by the will of the state can be valid only so long as they correspond to this will. Such is the doctrine which, according to many authorities, has long constituted the basic principle of the international dealings of sovereign states.

To illustrate this in a more specific way, reference may be made to the statement of the Russian Delegation to the First Hague Peace Conference of 1899 in which, with respect to a clause concerning international arbitration, it was stated:

[1] *Grundlinien der Philosophie des Rechts* (1821), sec. 331. See Lauterpacht, *Analogies*, p. 45.

In fact, the mutual rights and duties of states are determined to a marked degree by the totality of what we call political treaties, which are nothing but the temporary expression of chance and transitory relationship between the various national forces. These treaties restrict the freedom of action of the parties so long as the political conditions under which they were produced are unchanged. Upon a change in these conditions the rights and obligations following from these treaties necessarily change also.[2]

In this anarchical situation, which must continue so long as war is permssible as an instrument of national policy, it is difficult to conceive how a constructive system of law can be built upon precedents in the practie of states. Moreover, in the present structure of international society, international law has not yet been able to regard attack upon one of its members as a crime against that society, as is true within a state. In other words, in the state of nature war cannot be regarded as illegal. Each state is to be allowed, upon its own judgment and initiative, to undertake violent measures against another, and the latter must equally be allowed to use its own judgment and initiative as to the danger it faces and as to the measures necessary to defend itself against this danger. In fact, as the history of state relations in the past as well as recent events have shown, the state is still, to a marked degree, the sole judge of the necessity of taking defensive action.[3] As a result, it is not surprising that the doctrine of necessity has been pushed to immoral lengths and that

[2] See *Proceedings of the Hague Conferences of 1899* (Carnegie Endowment of Washington, 1920), p. 174.

[3] See Japan's official reply to the Lytton's report on Manchuria before the Council of the League. *New York Times,* Nov. 21, 1932, p. 8.

the so-called doctrine of self-defense has, at times, under the shield of law, served as an excuse for aggrandizement. Under such a state of affairs, international law has not been able to draw a definite line between the right of the state to existence, or self-preservation, and the right of the state to extend its dominion.[4] Thus, at times, the right of self-defense, when carried to its full length, often shades off into what, in substance, amounts to offensive action. For example, in the history of state practice, there have been a number of cases in which a state, in order to protect itself against a possible danger from a neighbor, interferes with the internal affairs of that neighbor or even, in extreme cases, brings that neitbor under its own dominance by force.

Moreover, in the present state of international relations, we often find the existence of so-called national policies maintained and advanced among the Great Powers. Such policies, in effect, infringe upon the rights which, in principle, are accorded to every independent state by international law. A most conspicuous instance of this is furnished by the Monroe Doctrine as declared by the United States. Strictly speaking, according to this doctrine, the United States will not permit other states to acquire additional territory or political control in the Western Hemisphere by any means or under any circumstances. The same may be said in all those cases in which particular states lay claim to what are known as "spheres of influence." For example, in the notice of

[4] This point is discussed fully in Professor W. W. Willoughby's *The Ethical Basis of Political Authority*, p. 362 *et seq.*

March 15, 1922,[5] served upon the other Powers by Great Britain concerning the status of Egypt, the latter government officially pronounced that, as the welfare and integrity of Egypt are so essential to the peace and safety of the British Empire, the British government "will not admit them to be questioned or discussed by any other Power" and "will regard as an unfriendly act any attempt at interference in the affairs of Egypt by another Power, and they (the British government) will consider any aggression against the territory of Egypt as an act to be repelled with all the means at their command." This declaration, which was a unilateral one upon the part of Great Britain and not one founded upon an agreement between itself and Egypt, is to be interpreted as a concrete example illustrating the extravagant moral claim of one power over the rights, as accorded by international law, of another.

Similarly, another illuminating illustration of this type of national policy is seen in the policies of Japan since 1894.[6] Since then Japan has, upon the ground of self-defense, asserted a similar right to spread her dominion over regions of Korea, Manchuria and Inner Mongolia. She contends that, having "special interests" in these regions, she has a right to take such actions as may be necessary to protect these areas of influence and control. In view of the existence of such national policies on the part of Great Powers, it is impossible at present to deduce a systematic and constructive régime of law

[5] See *British and Foreign State Papers, vol.* 116 (1922), p. 84.
[6] See W. W. Willoughby, *op. cit.*, p. 363 *et seq.*

from the practices of states, so long as states, in execution of such policies, base their contentions merely on grounds of expediency and necessity. Until the assertions of national policies are brought into a strictly limited régime of law, it is paradoxical to expect that any principle of international law can be built upon such a ground. And so long as these national policies still furnish to states the dynamic forces for their dealings with one another, such a vain hope can not possibly be realized. Furthermore, in the present state of the world's political development, a state is still the judge and executor of its own cause. Consequently, national strength still constitutes a main reliance for the assertion or redress of any international claim. In a word, at present the practice of states is uncontrolled in many respects, and it cannot easily be reduced to an effective system of jurisprudence by an adequate philosophy or rationalization.

All in all, with special reference to the application of the doctrine under consideration, it is futile to interpret and expound it purely and simply from the standpoint of the precedents of state practice without taking into account the merits each individual case and the fundamental principles of justice and equity inherent in the nature of the doctrine. In fact, as we have seen above, the doctrine has been abused in those cases in which it was invoked as an excuse to condone some wrong in regard to treaty obligations. It is easy to see that many a writer considers the doctrine a dangerous and undefined one.

It should here be observed, however, that it is also erroneous for us to interpret it from that angle.[7] In effect, such an interpretation of the doctrine, formulated in view of extravagant interpretation of the doctrine by some states, has tended to discredit the beneficial character of the doctrine.

From this viewpoint, the writer will, in the present chapter, examine some cases in which the doctrine has been invoked as a diplomatic expedient. In view of the complexity of each particular case, and for the sake of

[7] This fact is regrettable. A few writers upon this subject have attempted to define the doctrine in the light of past practice that a state under the operation of the doctrine has the unilateral right of abrogating treaties accordng to its own whim without first approaching others for mutual agreement. Thus Dr. Lauterpacht defines the doctrine: "That a state may lawfully rescind a valid treaty if there has taken place such a change of circumstances, that, in its opinion, the fulfillment of the treaty would dangerously affect its vital interests." See his treatise, *Analogies,* p. 167. Dr. C. Walter Young also adopted the same method to define the doctrine in the following terms: "the principle presumed to be an implied condition of any treaty, that when a fundamental change of circumstances has occurred which was not contemplated by either party to the treaty negotiated, or which make impossible or potently burdensome to one or the other state, the continued fulfillment of that treaty, that instrument itself may be unilaterally denounced by either party." See C. W. Young, *The International Legal Status of the Kwantung Leased Territory,* pp. 185, 186. Such definitions are mainly based on some precedents in the records of state practice of the doctrine in the past. Such an extravagant view of the doctrine has not been accepted by authorities on international law. For references to the moderate view, see footnote 43 in Chapter II. As a matter of fact, it is futile to define a rule which is based on human rights and which cannot be expressed in a definite formula. See R. Genet, *loc. cit.,* p. 288. The most reasonable meaning given to the doctrine, so far as the writer is aware, is expressed by M. Wigniolle. In his recent treatise on the subject, he says that according to the meaning of the doctrine "an agreement preserves its whole juridical value only when the circumstances attendant at its formulation remain the same and the object, in view of which it was concluded, can be attained." See his treatise, *La société des nations et la révision des traités,* p. 32.

convenience, the writer deems it necessary to classify them according to the procedure which international law has provided.[8] No doubt such an attempt is objectionable in many respects, inasmuch as there is no clear and definite line of demarcation which can be drawn for the purpose. For instance, in some cases treaty was first denounced by unilateral action by one contracting party demanding the application of the doctrine, but the issue was at last settled by common agreement between the parties concerned. In some cases, the denunciation of obsolete treaty obligations was effected by common effort of the Great Powers without obtaining the consent of the party or parties concerned as in the denunciation of treaty provisions by the Powers in Articles 31 and 435 of the Treaty of Versailles and dissolution of the Pact of London of 1915 by the Powers after the Great War. In view of such instances, the writer deems it his duty to say here that he will in no sense pretend to clarify the issue and merits and demerits of each individual case by his classification. Still, he will have to judge each particular case in the light of the procedure set forth by international law and in respect to the then existing international situation. Such an examination will involve questions both of historical fact in general and of the relative conceptions of justice and equity of each case in particular. In so doing, an attempt will be made to examine the cases carefully. It should here be added, however, that as reasons of space will not allow him to cite all cases in which the doctrine has been directly or indirectly invoked, he

[8] See the preceding chapter.

will, in this investigation, be content with a few illustrative cases which will supply sufficient evidence to demonstrate the limited scope of and procedure for the application of the doctrine.

## § 2. *Classification of Cases Based on Procedure as Provided in International Law*

### (a) *Cases of Nonconformity with the Proper Procedure*

1. *Russia's Denunciation of the Neutralization Clauses of the Treaty of Paris in 1870.* The first important episode, in which the doctrine was invoked in the diplomatic history of the nineteenth century, was presented by Russia's action in denouncing the neutralization clauses of the Treaty of Paris in 1870.[9] In 1856, following the termination of the Crimean War, an attempt was made by the Powers to settle the Southeastern question in a permanent manner as far as possible.[10] The object was twofold. First, in order to secure Turkey against attack by Russia, the Black Sea was declared neutralized and the maintenance of war ships and the establishment of naval and military assemblages on its coasts were forbidden. Secondly, in order to secure Russia against at-

[9] For a brief statement of the case see Hall, *International Law,* 8th ed. by Higgins, pp. 409-413; or Cobbett, *Leading Cases on International Law,* 4th ed., Vol. 1, pp. 334 ff. Cf. *Cambridge History of British Foreign Policy,* Vol. II, pp. 45-54; Lorimer, *Institutes of the Law of Nations,* Vol. I, pp. 45 ff.; Oppenheim, *International Law,* Vol. I, pp. 751-752.

[10] However, as subsequent history reveals, even British statesmen did not consider that the treaty would last very long. See Granville's speech in the House of Lords, February 14, 1871: "General Ignatieff told me that he remarked to Lord Palmerston, 'these are stipulations which you cannot expect will last long'." See *Cambridge History of British Foreign Policy,* Vol. III, p. 45 note 1. Cf. Morley, *Life of Gladstone,* II, p. 349.

tack by other powers, in view of these restrictions upon her, Turkey was under obligation to close the Bosphorus and Dardanelles to all foreign vessels of war except in case of hostilities in which Turkey herself might be engaged. In pursuance of this object, the Treaty of Paris was concluded on March 30, 1856, by Great Britain, France, Austria, Prussia, Sardinia, Russia and Turkey.

It was provided in the Treaty that the Black Sea should be neutralized and its waters and ports open to the mercantile marines of all nations but not to ships of war of either the riparian states or other powers;[11] that both Turkey and Russia were to be at liberty to maintain certain light vessels of war for the services of their coasts;[12] and that the Black Sea, being thus neutralized, no military or maritime arsenals should be established or maintained on the coasts by either Russia or Turkey.[13] Also, by a convention of the same date annexed to the treaty, it was provided that Turkey should maintain, and the powers should respect, the ancient rule of the Porte to forbid the entry of vessels of war into the Dardanelles and the Bosphorus so long as the Porte was at peace, but subject to a right on the part of the Porte to permit the entry of certain light vessels of war in the service of the missions of foreign powers, as well as two light vessels which by Article XIX[14] of the treaty, each of the Great

[11] Article 2. See Holland, *The European Concert in the Eastern Question*, p. 247.

[12] Article 14. See *ibid.*, the same page.

[13] Article 13. See *ibid.*, the same page.

[14] *Ibid.*, p. 250.

Powers signatory to the Treaty of Paris was allowed to station at the mouth of the Danube.

In 1870, when Germany and France were engaged in the Franco-Prussian War, Russia seized the opportunity and addressed a circular[15] to the Powers declaring itself relieved from the obligations of the treaty which had reference to the Black Sea, particularly Clauses XI, XIII and XIV. In this circular, it was stated that, through fifteen years' experience, the situation—that is, neutralization of the Black Sea—contemplated by this treaty was entirely changed. In particular, Russia pointed out that Great Britain and France had concentrated naval forces in the Mediterranean while Russia was disarmed, Turkey was at liberty to maintain a navy in the Straits and the Archipelego, and that ironclads, "unknown and unforeseen" in 1856, had been introduced. All these, it was said, tended to render the neutralization of the Black Sea illusory and to imperil the interest of Russia in that important water.

Besides the reason of changed circumstances, Russia contended in the circular that in the course of fifteen years the presence of three American vessels, one Russian, one English, one French and three of other nations for reasons other than those stipulated in the treaty, constituted an infraction of the absolute neutrality of the Black Sea, and that the acquiescence of the Powers in certain revolutionary changes, such as the union of

[15] See Martens, *Recueil de traités*, XVIII, pp. 269-273, or Hertslet, *The Map of Europe by Treaty*, Vol. III, pp. 1892-1897.

Moldavia and Wallachia, which were at variance with the letter and spirit of the treaty, had impaired the efficacy of the treaty.

In short, Russia, in justification of this action, maintained two positions: one based on the argument of changed conditions in the Black Sea after the conclusion of treaty; the other based on the alleged violations of treaty stipulations by the other Powers.

Since the other powers were paralyzed by the situation created by the Franco-Prussian War, Great Britain was the only great power to protest.[16] She took the general position that no party to a treaty could be released from its obligations except with the consent of the other parties. In her reply to the Russian circular, Great Britain strongly maintained that the doctrine and proceeding advocated by Russia would "bring the entire authority and efficacy of treaties under the discretionary control of each of the Powers who may have signed them, the result of which would be the entire destruction of treaties in their essence."[17] Subsequently, the other Powers also refused to entertain the Russian contention.

16 For the attitude of other Powers towards the Russian Circular, see *Cambridge History of British Foreign Policy*, Vol. III, pp. 48 ff.

17 "The despatches of the Russian Government", Great Britain replied, "appear to assume that any one of the powers who have signed the engagement may allege that occurrences have taken place which, in its opinion, are at variance with the provisions of the treaty, and, though their view is not shared or admitted by the co-signatory Powers, may found upon that allegation, not a request for a consideration of the case, but an announcement that it has emancipated itself, or holds itself emancipated, from any stipulations of the treaty which it thinks fit to disapprove." See Hertslet, *op. cit.*, Vol. III, p. 1899.

Thereupon, through the initiative of Bismark,[18] Russia deemed it expedient to abandon her position and acquiesce in a settlement of the question by a conference.

Accordingly, a conference of such of the signatory-powers of the Treaty of Paris as could attend was called in London. As a result, the British position was recognized by a declaration in which it was stated that: "It is an essential principle of the law of nations that no power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting Powers by means of an amicable arrangement."[19] However, after solemnly enunciating this elementary principle, the Powers then proceeded to comply with the demands of Russia, and the three clauses and the attendant convention, which Russia desired to be released from, were accordingly abrogated by the same Powers.[20] In short, the diplomatic duel resulted in a victory in principle for Great Britain, but in a practical triumph for Russia.

This instance is important and significant in the discussion of the doctrine because it serves to illustrate more

[18] See *Cambridge History of British Foreign Policy*, Vol. III, pp. 50 ff.

[19] See Hertslet, *op. cit.*, Vol. III, p. 1904. In condemning Germany's violation of the military clauses of the Treaty of Vessailles, the Council of the League of Nations on April 18, 1935, reiterated practically the same principle. In its resolution proposed by France and passed by a "unanimous" vote with abstention of Denmark, the followng words were pronounced: "It is an essential principle of the law of nations that no nation has the power to liberate itself from the engagements of a treaty, nor to modify stipulations except by consent of the contracting parties."

[20] See *British and Foreign State Papers*, vol. 61, p. 7; or Hertslet, *op. cit.*, pp. 1920-1921.

or less the general nature and scope of the application of the doctrine in the last century by some continental states. Whether Russia was justified in 1870 in asking to be released from the obligations imposed upon her by the Treaty of Paris in view of the doctrine is a question of opinion regarding the interpretation of the extent of changed conditions actually occurring then in the Black Sea.[21] But it seems certain that the principle involved in Russia's contentions could not be seriously questioned. Russia's position was undoubtedly wrong in form, if not in substance,[22] according to the proper procedure set forth for the application of the doctrine. On the other hand, the Declaration of London cannot be read as a clear evidence of the rejection of the doctrine in question. It should be read in the light of the peculiar circumstances

21 Probably Russia was not justified by the facts which actually occurred in the Black Sea. For criticism against Russian contentions, see Hall, *op. cit.*, p. 338.

22 Even some English writers after the Russian action had held that in substance Russia's action was justified; e,g., J. S. Mill wrote in 1870 in connection with this incident: "If a lawless act has been committed in the present instance, it does not entitle those who imposed the conditions to consider the lawlessness only, and to discuss the more important consideration whether, even if it was wrong to throw off the obligation, it would be still more wrong to persist in enforcing it. If, though not fit to be perpetual, it has been imposed in perpetuity, the question when it becomes right to throw it off is but a question of time. No time having been fixed, Russia fixed her own time, and naturally chose the most convenient." See Moore, *Digest,* Vol. V, p. 339. Lorimer, the Scottish philosopher-juristi referring to the conduct of Russia in this matter, observed that Russia "was entitled to invite her co-signatories to meet with her for the consideration of such changes as she might suggest in the treaty of 1856, or even its repeal; and that in the conference, when she might have renounced the treaty either in whole or in part." See Lorimer, *op. cit.,* Vol. I, p. 48. Westlake appears to hold the same view. See Westlake, *International Law,* Vol. I, pp. 296-297.

under which it was pronounced.[23] in fact, the Declaration only set a limitation to the doctrine so that it does not give a state, immediately after a change of circumstances, an omnipotent right to be released from treaty obligations without first approaching the other party or parties for mutual agreement. Such limitation is quite reasonable and necessary in order to reconcile the doctrine with the rule of *pacta sunt servanda,* a reconciliation which respect for international law seems to dictate.

2. *Russia's Denunciation of Article 59 of the Treaty of Berlin in 1886.* Just as she had done in 1870, Russia, in 1886, denounced unilaterally the obligations imposed upon her by Article 59 in the Treaty of Berlin of 1878 with regard to the freedom of the Port of Batoum.[24]

[23] For this point see Cobbett, *op. cit.,* Vol. I, 339; Woolsey in A. J. I. L., Vol. XX, 1926, p. 349. In regard to Declaration of London, Wheaton (by Boyd, p. 106) comments: "It is melancholy to think that the most civilized Powers of the world should have considered it necessary to put forward such a declaration in the year of 1871." Hall comments as follows: "The general correctness of the principle is indisputable, and in a declaration of the kind made it would have been impossible to enounce it with those qualifications which have been seen to be necessary in practice." *International Law,* sec. 116. Lawrence observes that this principle enunciated by the Declaration of London "sounds well; but a little consideration will show that it is an untenable as the lax view that would allow any party to a treaty to violate it on the slightest pretext." *Principles of International Law,* sec. 134. Krabbe in *The Modern Idea of the State* (English translation p. 266) expounds it as a *Protestatio actui Contraria* which cannot hold true as a general principle. For other references on the criticisms against this Declaration, see Oppenheim, *International Law (4th ed.),* Vol. I, p. 752; Fenwick, *International Law,* p. 347; and *Encyclopedia of the Laws of England,* XX, p. 273.

[24] For reference see Rolin-Jaequemyns in *Revue de droit international et de législation comparée,* XIX, 1887, pp. 37-49; Pouritch, *De la clause "rebus sic stantibus",* sec. 9, pp. 112-116. For Documents see Martens, *op. cit.,* 2nd series, t. III, pp. 398 ff.

Article 59 of the treaty of Berlin provided that "His Majesty the Emperor of Russia declares that it is his intention to constitute Batoum a free port, essentially commercial." In 1886, Russia, in spite of the provision in the Declaration of London in regard to sanctity of treaties signed by herself and her promise to make Batoum a free port, repudiated the Article by a ukase. She alleged that the Article was only a spontaneous declaration of the Tsar and not a product of general agreement, that the reasons for making Batoum a free port no longer existed, and that the existence of Batoum as a free port if not abolished would injure the well-being of the province. All the signatory Powers to the treaty of Berlin seemed to tolerate such an acton with the exception of Great Britain, on whose behalf Lord Rosebery protested vigorously against it as a dangerous violation which would tend to make future international engagements difficult and to cast doubt on those already concluded. Notwithstanding the protest, the Tsar, by a ukase of July 5, took away from Batoum its status as a free port.

The arguments advanced by Russia in support of its action may be summarized as follows: First, the position of the free port of Batoum was created by the free will of the Sovereign and not by general agreement. For this reason, Russia declared, the Sovereign could change it whenever it so willed. Secondly, Russia advanced an argument based on the change of circumstances. The object of article 59 was the guarantee of transit to Persia. But, after the modification of the internal situation in the Caucasus, the object of the said Article could no longer

be achieved. Since Article 59 had no object, Russia acquired the right to be released from the stipulation.

In view of the changed condition, Russia probably had good ground by virtue of the doctrine of *rebus sic stantibus* to demand the revision of the Article through amicable means.[25] But in fear of the heavy compensation which was likely to be demanded by the other signatory Powers she again failed to observe the proper procedure in the application of the doctrine and sought a short cut out of the difficulty without approaching the other powers for their mutual consent. Russia, however, made good her claim again and the signatory Powers to the Declaration of London seemed to give their tacit assent to the effect of changed circumstances upon treaty stipulations.

3. *Annexation of Bosnia and Herzegovina by Austria-Hungary and the Declaration of the Independence of Bulgaria in 1908.* The most severe blow to the principle enunciated in the Declaration of London was the action of Austria-Hungary, in defiance of Article 25 of the Treaty of Berlin of 1878, proclaimed her sovereignty over Bosnia and Herzegovina; and Bulgaria, in defiance of Article 1 of the same treaty, declared herself independent.[26]

By Article 1 of the Treaty of Berlin, Bulgaria was constituted an autonomous and tributary principality under the suzerainty of the Sultan with a Christian

[25] Cf. Pouritch, *op. cit.*, p. 115.

[26] For reference see Martens, *op. cit.*, 3rd series, II, pp. 657-666; Blociszewski in *Revue Général de droit international public*, XVII (1910), pp. 417-449. Cf. *Cambridge History of British Foreign Policy*, III, pp. 402-412.

Government and a national militia. But, in the year 1885, the province of Eastern Roumelia, which was also given by Article 13 of the same treaty the same status as Bulgaria under the direct political and administrative authority of the Sultan, drove out the Turkish Governor-General and formed a union with Bulgaria. This union was virtually recognized by the Powers signatory to the Treaty of Berlin. A year later the union became more real, and the governor-generalship of the province of Eastern Roumelia was entrusted to a prince of Bulgaria. However, the other stipulations relative to the principality were declared still in force.[27] On the 5th of October, 1908, Ferdinand, the prince of Bulgaria, without previous notice, issued a declaration to the effect that the Bulgarian nation "was impeded in its normal and peaceful development by ties the breaking of which will remove the tension which has arisen between Bulgaria and Turkey." Thereupon, he assumed the title of Tsar and announced that Bulgaria would rank as an independent Kingdom.

Two days later, Emperor Francis Joseph of Austria-Hungary issued a declaration and proclaimed his authority over Bosnia and Herzegovina which the treaty of Berlin of 1878 had entrusted to her to "occupy and administer" thirty years before. No notice was given to Turkey, although after the action was taken the great Powers were notified. Great Britain again protested and reiterated the principle of the Declaration of London that

[27] Hertslet, *op. cit.*, p. 3154.

no change in the stipulations of the Treaty of Berlin of 1878 could be made by any Power without previous consultation with other Powers, and in this case especially Turkey.[28] This deliberate violation of the Treaty of Berlin considerably endangered the peace of the world. Thereupon, on the initiative of Sir Edward Grey, an international conference was proposed for the purpose of considering the settlement of the Near Eastern question. But Austria-Hungary refused to give her consent to such a proposal and preferred to negotiate with Turkey alone on the matter,[29] with the result that a Protocol was signed by the two Powers on February 26, 1909, according to which Turkey received a substantial indemnity in money and other concessions.[30] On the 27th of March of the following year Russia accepted the annexation of Bosnia and Herzegovina as a *fait accompli*. Germany had already acquiesced. Turkey had already come to an understanding with Bulgaria, by which the Sultan abandoned all titular rights in consideration of a pecuniary guarantee. Therefore, the demand for an international conference was abandoned and the Powers gave their consent, on April 7, 1909, to the abolition of Article 25 of the Treaty of Berlin.[31]

The two main arguments, as revealed in the Austro-Hungarian Declaration,[32] put forward by Austria-

[28] See *Cambridge History of British Foreign Policy*, III, pp. 403-404.
[29] *Ibid.*, p. 405.
[30] See Martens, *op. cit.*, 3rd ser., II, p. 661.
[31] See Martens, *op. cit.*, 3rd ser., IV, p. 31.
[32] Cf. Pouritch, *op. cit.*, pp. 129-131.

Hungary regarding the doctrine *rebus sic stantibus,* were the changes of circumstances in both Turkey and the two provinces of Bosnia and Herzegovina. It was alleged, on the one hand, that, due to the actual development in the two provinces and the desire of the people for constitutional government, it was better to allow the two provinces to be removed entirely from the control of the Sultan. On the other hand, it was argued that the inauguration of the constitutional régime in Turkey by the Young Turks in the month of July of 1908 rendered the administration of the said provinces practically impossible. Whether these arguments were sound or not is a question of interpretation of the actual situation then existing, which, however, is not within our compass to discuss here.[33] But, undoubtedly, the method adopted by Austria-Hungary, as well as Bulgaria, was not in accord with the proper procedure required for the application of the doctrine. However, here again we find a case through which the "so-called" fundamental principle of international law which was solemnly affirmed by the Great Powers in 1871, including Austria-Hungary herself, was severely impaired and "the violation", as cynically remarked by Higgins,[34] "was openly condoned" by the powers.

[33] Pouritch thinks these were not sound and reasonable arguments. See *op. cit.,* pp. 134-136. But, as observed by Lawrence, Austria-Hungary probably had a strong case for adding Bosnia and Herzegovina in view of the changed situations since the conclusion of the Treaty of Berlin in 1878. However, the methods employed, as observed by the same author, were most unfortunate. See Lawrence, *op. cit.,* 4th ed., p. 329.

[34] In Hall, *op. cit.,* 7th ed., p. 368.

4. *Violation of Belgian Neutrality by Germany in 1914.* The most flagrant and regrettable instance in which the doctrine has been invoked was in the violation of Belgian neutrality by Germany in 1914.[35]

The chief object of the neutralization of Belgium was the maintenance of a balance of power[36] in Europe after the downfall of Napoleon I. The character of her neutrality was not like that of Luxemburg, whose status was of unarmed neutrality,[37] but was of such character that it "would not be impaired by any changes in the political or military constitution of the country."[38] In 1914, the Imperial Government of Germany, under the guise of military necessity, invoked the doctrine *rebus sic stantibus* as one of its strong arguments in justification of its wrongful actions. It asserted, in general, that the conditions under which the treaty of 1839 for the neutralization of Belgium had been contemplated were totally changed. In particular, it pointed out that, in view of the doctrine of *rebus sic stantibus,* the increase of Belgian population, the acquisition of Congo-territory in Africa, and the increase of the strength of the Belgian army during the period 1839-1914 had altered the whole basis of the Belgian state and thereby rendered the Treaty of 1839 obsolete.

[35] See Garner, *International Law and the World War*, sec. 449, pp. 217-220. Cf. his article in A.J.I.L., vol. 21 (1927), p. 513; and Higgins, *International Law and Relations*, pp. 137-139.

[36] See Higgins, *op. cit.*

[37] See Garner, *op. cit.*, p. 218.

[38] *Ibid.* For documentary evidence see the Protocol of January 27, 1931, in Martens, *op. cit.*, 1st series, Vol. X, p. 170.

In view of the principle of, and the proper procedure under, the doctrine, together with the historical background for the conclusion of the Treaty of 1839, such an interpretation of the doctrine on the part of Germany was indefensible. For, as already indicated, the change of circumstances under which the doctrine could be applied was the removal of the very foundation of *raison d'être* of the treaty, or the occurrence of a vital change in the state of things under which the treaty was concluded. In 1914 neither the main object nor foundation of the treaty of 1839, that is, the maintenance of a balance of power, had disappeared, nor had the geographical situation of Belgium, under which the Treaty of 1839 was contemplated, been altered to such an extent as to render the obligations of the treaty obsolete. Besides, such natural and normal change of conditions in the life of the state as the natural growth of population and the increase of national strength could not in the present case be maintained as changed circumstances which would render the Treaty of 1839 obsolete and terminable at the caprice of one of the contracting parties.[39] Moreover, even admitting that the change had warranted Germany to invoke the doctrine, the method adopted by her was not in accord with the procedure required in the application of the doctrine; for Germany had made no effort to demand that the Treaty of 1839 be modified or abrogated through negotiation with the other parties, but employed, instead, the method of direct repudiation of the treaty by her deliberate unilateral action.[40] In

[39] Garner's article, *loc. cit.*, p. 513.
[40] See Garner, *op. cit.*, p. 220.

short, the unlawful action of Germany in 1914 furnishes us a typical instance in which the doctrine has been abused for the purpose of hiding shameful wrong under the shield of law. Neither in substance nor in form does the doctrine warrant such action.

5. *Abrogation of the Capitulations by Turkey in 1914.* A more instructive case in which the doctrine has been invoked is presented by the repeated attempts on the part of Turkey to abrogate the Capitulations by unilateral action.[41]

The attempt to abolish such a régime was begun early in 1881. But, due to the strong protest from the Great Powers that the Sultan had no authority to annul the existing usages without previous consultation and agreement with the Powers concerned, the attempt failed. In 1914, when the Great War broke out, Turkey attempted again to abrogate the system by unilateral action. On September 10, 1914, the Turkish minister for Foreign Affairs sent an identic note to the Foreign Ministers residing in Constantinople to the effect that on and after the first of October, the Ottoman Empire would abolish the capitulations which restricted the sovereignty of Turkey in her relations with certain Powers. One of the

[41] See Shih Shun Liu, *Extraterritoriality: Its Rise and Its Decline, pp.* 175-197. Cf. Woolsey's editorial comment in A.J.I.L., Vol. XX, 1926, pp. 346-351 wherein he seems to justify the abolition of the capitulations in Turkey by stating: "The termination of indefinite or perpetual treaties is justifiable, if and when the fundamental circumstances or relations of the parties obtaining at the time and forming the basis of the treaty, or the tacit conditions thereof, are materially or essentially changed or altered." *Ibid.*, p. 349.

main arguments which the Turkish government employed to justify her action was the invocation of the doctrine *rebus sic stantibus*. It was stated that Turkish jurisprudence had improved to such an extent that the capitulatory régime had lost its *raison d'être*. Besides, Turkey contended, such a system was "incompatible with the principle of national sovereignty as well as prejudicial to the progress and development of the Empire." However, on the same day all the Powers concerned, including Germany and Austria, vigorously protested. They reiterated that the capitulatory régime, as it existed in Turkey, was not an autonomous institution created by the Turkish Empire, but was the result of international treaties and agreements which, in essence, could not be abolished either wholly or in part except in consequence of an understanding with the other contracting Powers.[42]

Finally, at the First Lausanne Conference, 1922-1923, Turkey again defended her action of 1914, but abandoned her former position that the existence of the capitulations was a unilaterial convention created by the Porte, and expounded the doctrine *rebus sic stantibus* more or less in its actual sense. She argued that the capitulations, even though without term, were not intended to be permanent and that it could not be inferred that they were unchangeable and everlastingly irrevocable. She contended that treaties without term "imply the clause

42 For example, see especially the answer of the American Ambassador Morgenthau, September 10, 1914, to the Turkish Imperial Government. See *Foreign Relations*, 1914, p. 1093.

*rebus sic stantibus,* in virtue of which a change in the circumstances which have given rise to the conclusion of a treaty may bring about its cancellation by one of the contracting parties, if it is not possible to cancel it by mutual agreement." Subsequently, following many negotiations, Turkey obtained her desired end through bilateral agreements.[43]

Thus the history of the abolition of the capitulatory system in Turkey supports the view that a state which seeks to be released from certain obsolete treaty obligations by having recourse to the doctrine *rebus sic stantibus* does not have an immediate right to liberate itself from such treaty obligations without first asking the consent of the other states. In the present case the doctrine might have been legitimately advanced by Turkey, but the unilateral action adopted by her in 1914 was not in accord with the proper form of procedure which is recognized by many authorities as a necessary step for the application of the doctrine. Eventually the Ottoman Empire was compelled to adopt the necessary procedure and obtained her desired end by approaching other parties for their mutual consent instead of by unilateral cancellation.[44]

[43] See Liu, *op. cit.,* Chapter X. It may be interesting to observe here that in the Conference of Lausanne the Turkish government had consented to the suspension of the unilateral cancellation of the Capitulations. See Scott, *Diplomatic Documents Relating to the Outbreck of the European War* (New York, 1916), pt. II, pp. 1422-23.

[44] In connection with the action of Turkey in 1914, see editorial comment in A.J.I.L., vol. 8 (1914), pp. 873-876. Japan, Siam, and Persia also sought to abolish extraterritoriality by this method. See Liu, *op. cit.,* Chapter X. China is pursuing the same course, as will be shown later.

(b) *Cases of Conformity with the Proper Procedure*

1. *Abrogation of the Clayton-Bulwer Treaty of 1865.* The negotiations for the abrogation of the Clayton-Bulwer Treaty of 1850 by the Hay-Pauncefote Treaty of 1901 between the United States and Great Britain furnish us an instance in which the doctrine *rebus sic stantibus* has been legitimately and properly applied through the perseverance of American statesmen.

The Clayton-Bulwer Treaty of 1850 was concluded between the United States and Great Britain to assure the joint ownership and control of any trans-Isthmian Canal that might be constructed connecting the Atlantic and Pacific Oceans. In this treaty no provision was made for its own termination. About thirty years after the treaty was concluded, the United States became dissatisfied[45] and endeavored to abrogate it. So, on November 19, 1881, Secretary Blaine, in a note[46] of instruction to Mr. Lowell, American Minister at London, argued emphatically that, in view of the remarkable development of the United States on the Pacific Coast, together with other changes that had taken place, the treaty, in view of the principle of *rebus sic stantibus,*

[45] Thus Secretary Blaine in 1881 characterized it as "misunderstandingly entered into, imperfectly comprehended, contradictorily interpreted, and mutually vexatious." Even early in 1857 President Buchanan said that if the United States had known beforehand the treaty would be susceptible of the construction put upon it by Great Britain, it would never have been negotiated, nor would it have received the approval of the Senate. Mr. Cass, a Senator at the time when the treaty was ratified, subsequently made a similar declaration. See Foster, *A Century of American Diplomacy,* pp. 456-58.

[46] See *Foreign Relations,* 1881, pp. 554-59.

should be modified if not considered terminated. He emphasized that "the treaty was made more than thirty years ago, under exceptional and extraordinary circumstances which have long ceased to exist. . . . conditions which at best were temporary in their nature and which can never be reproduced."[47] His successor, Mr. Frelinghuysen, in 1882 and 1883 maintained that the treaty was for several reasons at least voidable and thus no longer binding on the United States. He did not, however, refer to the changed conditions.[48] But this position was not accepted by the British Government, and the agitation continued.

In 1891, the Senate Committee on Foreign Relations presented to the Fifty-first Congress a report containing a review of the history of the treaty of 1850 with a conclusion that the Convention of 1850 had become obsolete and that "the United States is at present under no obligations, measured either by the terms of the convention, the principles of public law or good morals, to refrain from promoting in any way that it may deem best for its just interests the construction of this Canal, without regard to anything contained in the Convention of 1850."[49]

However, in 1896, Mr. Olney, then Secretary of State, addressed to the President a memorandum in which, after reviewing the declaration of his predecessors

[47] *Ibid.*, 1881, p. 554.

[48] *Ibid.*, 1882, p. 271; and *ibid.*, 1883, pp. 418, 477. Cf. Hyde, *International Law*, Vol. II, p. 81 note 4.

[49] See *Senate Report, 1944, 51st Cong. 2nd. session*, pp. 405.

Mr. Blaine and Mr. Frelinghuysen, he said : "If changed conditions now make stipulations which were once deemed advantageous, either inapplicable or injurious, the true remedy is not in attempts to deny the existence of the treaty or to explain away its provisions, but in a direct and straight forward application to Great Britain for a reconsideration of the whole matter."[50]

Finally, influenced by strong public sentiment and the wiser men in the administration and the Senate, resolutions were introduced in the Senate requesting the President to open direct negotiation with Great Britain looking to the abrogation or modification of the treaty.[51] The negotiations were accordingly instituted, and, in 1901, Secretary Hay succeeded in concluding a new treaty known as the Hay-Pauncefote Treaty, by which the Treaty of 1850 was expressly superseded.[52]

2. *Termination of the Sino-Belgian Treaty of 1865.* The same course, it may be said, was pursued by China

[50] See Moore, *Digest,* Vol. III, p. 202. Lauterpacht thinks this address was a condemnation of the doctrine. In fact, according to the theory of the doctrine developed above, this address should be regarded as the correct statement of the procedure in its application.

[51] See *Congress Record,* Dec. 8, 1898, vol. 32, p. 55; *ibid.,* Dec. 13, 1900, vol. 34, p. 265.

[52] See *Treaties in Force,* 1904, p. 3 1, Article I. However, as observed by Butler in 1902, if the Executive failed to obtain the abrogation or proper modification of the treaty through friendly diplomacy and if, "in the best judgment of the legislative department of the Government, the present and future safety of the country demand the abrogation of that treaty, Congress has not only the legal power but also the moral right to abrogate it." See *Treaty-making Power of the United States,* Vol. II, p. 139. "The right of any nation to abrogate any treaty (which does not contain any time limit or method of abrogation) must depend upon the nature of the stipulations, the circumstances under which the treaty was made, and those under which one party seek to abrogate it and the other to sustain it." *Ibid.,* p. 136.

for the termination of the Sino-Belgian Treaty of November 2, 1865, during the years 1926-1928.[53]

This Sino-Belgian Treaty of 1865 was a treaty of friendship, commerce and navigation and was an aftermath of the war of 1857. It represented in typical fashion the unequal treaties which China was obliged to conclude with other western Powers. In this treaty, unilateral consular jurisdiction was granted to Belgian nationals in China, tariff autonomy was surrendered, and most-favored-nation treatment was provided. Worst of all, the striking symbol of the basis of the inequality of the treaty was found in Article 46 which gave Belgium the sole right either to denounce the treaty or to approach the Chinese Government in order to negotiate a modification of its terms. Since its conclusion, Belgium had not found occasion to request a revision of the treaty.

On April 16, 1926, under the pressure of the nationalist movement in China, the Peking Government presented a note to the Belgian Government informing the latter that the Treaty of 1865 should be revised or terminated on October 27 of 1926. The note stated:

> The aforesaid treaty, which still regulates the commercial relations between the two countries, was concluded as long as sixty years ago. During the long period which has elapsed since its conclusion so many momentous political, social and commercial changes have taken place in both countries that, taking all circumstances into consideration, it is not only desirable but also essential to the mutual

[53] For reference, see *World Peace Foundation Pamphlets,* Vol. XI, pp. 32-34; *Survey of International Affairs,* 1926, pp. 273-276; and *China Year Book,* 1928, pp. 766-786.

interest of both parties concerned, to have the said treaty revised and replaced by a new one to be mutually agreed upon.

As conditions and circumstances in human society are constantly changing, it is manifestly impossible to have any treaty which can indefinitely remain good for all times without modification. International agreements, particularly treaties of commerce and navigation, are, as a matter of international practice, always subject to more or less frequent revisions in accordance with the nature and circumstances of each case, even in the absence of any express provision to that effect, so that necessary readjustments may be effected from time to time to the best advantage of the contracting parties. With the view just expressed above the Chinese Government is glad to note that the Belgian Government is in full accord, as in its reply of September 4, 1925 to the Chinese note of June 24, 1925, the Belgian Government expressed its readiness to consider China's proposal for the modification of her existing treaties.[54]

At the same time China intimated a desire to conclude a new treaty with Belgium on the basis of equality and reciprocity.

In the reply of the Belgian Minister to the Chinese Government on April 27, 1926, Belgium notified the latter that Article 46 gave "to the Belgian Government alone under certain conditions the right to call for the revision of the clauses which they consider useful to modify." Nevertheless, she promised to undertake a revision of the treaty with a condition that this should be postponed until the results of the Customs Conference and the Extraterritoriality Commission which was then in session at Peking were made known.[55]

[54] See *China Year Book*, 1928, p. 770.
[55] *Ibid.*, p. 771.

But China, fearing the treaty would continue for another decennial period, declined to agree to a postponement of the negotiations for a new treaty as suggested by Belgium. Nevertheless, China agreed to consider the possibility of finding a provisional *Modus Vivendi* which would safeguard the legitimate interests of Belgium and at the same time would not impair the inherent right of China, in case a new treaty could not be completed before October 27, 1926.[56]

Consequently both parties undertook to reach a *Modus Vivendi* which would take effect on October 27, 1926, and continue until a new treaty was concluded. But opinion was divided between China and Belgium in regard to the duration of the agreement. China insisted on fixing the duration of six months for the *Modus Vivendi,* within which a new treaty must be concluded to take the place of the treaty of 1865; while Belgium insisted that the *Modus Vivendi* should be renewable at the request of either party for six months periods without limit. No agreement could be reached, so the negotiations for a *Modus* came to an end on November 5, 1926, when the Belgian Government declined to accept the view of the Chinese Government.[57]

Thereupon the Chinese Government, on November 6, 1926, issued a formal statement declaring the Treaty of 1865 terminated. It was stated that the failure of the

[56] See the note of Wai Chiao Pu sent to Belgian Minister on July 24, 1926. *Ibid.,* p. 772.

[57] See the Reply of Belgian Government on November 5, 1926. *Ibid.,* pp. 779-780.

negotiations for a *Modus* on the point of settling a definite time for the conclusion of a new treaty evidenced the wilful intention on the part of Belgium to put off the conclusion of a new treaty, and thus led China to take this necessary step. However, in conclusion, the note still intimated that the Chinese Government was ready at any time to negotiate and conclude a new treaty with Belgium on the basis of equality and mutual respect.[58]

On the other hand, having failed to reach a *Modus,* Belgium intimated that she was compelled to take the question of the interpretation of Article 46 of the treaty to the Permanent Court of International Justice, whose compulsory jurisdiction China as well as Belgium had voluntarily accepted, and suggested that the terms of a *compromis* should be agreed upon the submission of the case to the Court.[59] But China, considering that the issue between China and Belgium was not merely the technical interpretation of Article 46 of the treaty of 1865 but the application of the principle of equality of treatment, contended that this could not be made the subject of judicial inquiry. Nevertheless China suggested that the case, if there was to be an appeal to some international authority, should be submitted to the League of Nations under the terms of Articles XI and XIX of the Covenant —presumably that the League should decide the question whether the treaty of 1865 had become inapplicable and whether it was consonant with the basic principle of equality among nations.[60]

[58] *Ibid.,* pp. 781-782.
[59] *Ibid.,* p. 783.
[60] *Ibid.,* p. 784.

Unable to obtain a joint *"Compromis"*, Belgium, on November 25, 1926, addressed a unilateral application to the Permanent Court of International Justice under Article 40 of the Statute, in which she raised the question as to China's right to denounce the treaty of 1865 under Article 46 of the treaty of 1865. Thereupon, the Court notified the Chinese Government to select a judge of their own nationality to sit upon the bench under Article 31 of the Statute. On January 3, 1927, Belgium filed with the Court the memorial of its Government concerning the case, which was also submitted to the Chinese Government. In this memorial Belgium presented three arguments which related to the terms of Article 46 of the Sino-Belgian Treaty, the principle of the juridical equality of states, and the principle of *rebus sic stantibus*. The memorial also petitioned the court to issue a protective measure on behalf of Belgian interests in China pending its decision and asked the Court to give judgment whether the Chinese Government "is present or absent." China, maintaining her original position regarding the nature of the issue, has at no time appeared before the court or recognized any jurisdiction conferred by this appeal. However, in view of the "Optional Clause", the president of the Court proceeded to set various dates for the filings of the written proceedings and ordered provisional measures[61] for the protection of Belgian subjects, property and rights.

Subsequently, pending a decision of the court, negotiations were reopened between the two Governments for

[61] See P.P.C.I.J., Ser. A. Nos. 8 and 14.

the conclusion of a treaty abrogating the treaty of 1865. On several occasions the Belgian Government asked the court to facilitate the negotiations by extending the dates for the submission of a counter-case by Chna.[62] Finally, the treaty was replaced by a new one between China and Belgium on November 22, 1928, through the usual diplomatic procedure.[63]

The question raised by the abrogation of the Sino-Belgian Treaty of 1865 is important and significant. It is interesting in discussion of the doctrine *rebus sic stantibus* because it shows how the doctrine can be legitimately invoked for the recovery of sovereign rights and equality among nations, even though there exists in the treaty a stipulation providing the contrary, if the dissatisfied party has persistently rested its case on the ground of changed conditions and followed the proper steps required for the application of the doctrine. It is particularly significant at this moment, when China's intention to terminate all its so-called "unequal treaties" with other Powers is mainly based on the right resulting from the principle of *rebus sic stantibus*. The abrogation of the Sino-Belgian Treaty of 1865 was a "test case." Ever since the opening of the present century, China has made repeated attempts to secure the modification of treaty restrictions on her sovereign rights, particularly territorial jurisdiction and tariff autonomy. The outcome of China's unwavering persistence in seeking the abrogation of the Belgian Treaty is the clearest and

[62] See *World Peace Foundation pamphlets,* Vol. VI, 1928, pp. 33-34.
[63] For the text of the treaty, see *China Year Book,* 1930, p. 851.

strongest evidence that, under the pressure of radical change of conditions—social, economic and political—China can no longer be bound by such obsolete treaty obligations as those imposed upon her at a remote time and under conditions which were unforeseen and totally different from those existing today, and which, if not revised and terminated, would undoubtedly deprive her of her sovereignty and independence and hinder her natural growth and development.

No authority on international law would question the right of a sovereign state to seek a revision or termination of a treaty on the ground of changed conditions or the interests of its national existence and domestic welfare. And this right had been exercised by other states long before China pleaded her case with Belgium.[64] To deny the right of a state to seek to terminate such a treaty under such conditions would be to deny the right of a state to rid itself of an incubus upon its existence and independence which neither the general sense of mankind nor international law would approve.

It may be admitted, however, that the conciliatory attitude of the Belgian Government through the whole course of the negotiations in this case was highly commendable. Before the controversy broke out the Belgian Government had expressed its readiness to consider

[64] For the past practice of the United States, see Foster, *Practice of Diplomacy,* Chapter XV, epec. pp. 299-305; Crandall, 772; and Hyde, sec. 541, note 4. Cf. Butler, *op. cit.,* I, pp. 132, 136; Mathews, *The Conduct of American Foreign Relations,* Chapter XIII, pp. 223 ff.; and Cobbett, *op. cit.,* 4th ed., Vol. I, pp. 340-341.

China's proposal for the modification of her existing treaties,[65] and when the negotiations for a new treaty were going on in 1926, the Belgian Government again made known its view that the instrument of 1865 belonged to the category of "unequal treaties" and that it was willing to renounce this indefensible system.[66] Unfortunately Belgium, insisting too much on her technical rights, did not go a step further and fulfil her promise, but merely waited for the development of circumstances, thus eventually driving China to the last resort which many authorities seemed to warrant under extreme conditions. But since the conclusion of a new treaty to replace the Treaty of 1865 between China and Belgium on November 22, 1928, the question raised has been settled by mutual action.[67]

[65] Belgian reply of September 4, 1925 to the identical note addressed by China on June 24, 1925 to the Sixteen Powers for the revision of her existing "unequal treaties." See *China Year Book,* 1926, pp. 943, 936.

[66] Public statement made by the Belgian Minister for Foreign Affairs, Monsieur Emile Vandervelde, on August 27, 1926. See *Le Temps* August 29 and *The Times* October, 1926.

[67] The public statement of November 6, 1926, made by the Chinese Government for the termination of Sino-Belgian Treaty of 1865 can be viewed as merely a gesture to accelerate the negotiations for the revision of the said treaty, but cannot be interpreted as a legal termination of the treaty of 1865 by China. See the urgent attempts of China to continue negotiations for a new treaty with Belgium after the Declaration. This declaration was like the abogation of the treaty of alliance by the United States with France in 1798 by an express act of Congress. The legitimacy of the abrogation was not recognized by France until the conclusion of a new treaty in 1800. See Moore, *Digest,* Vol. V, pp. 357, 609-612. However, it is worth observing here that Belgium on August 31, 1929, on her own initiative and without compensation restored to the National Government of China, the Belgian Concession in Tientsin, which was granted to her by the Sino-Belgian Convention of February 5, 1902. For the agreement and declarations see *Chinese Social and Political Science Review,* Vol. XIII, October, 1929, pp. 177-181.

3. *Attempted Abolition of Extraterritorial Rights by China.* Since the beginning of the present century, China has adopted the same course she pursued in the case just mentioned to effect the revision of all other items in her "unequal treaties" with other Powers, particularly to effect recovery of tariff autonomy and the abolition of the extraterritoriality régime. Through progressive negotiations with the other Powers concerned, China's fiscal restrictions were removed *in toto* in 1928 by the conclusion of a series of new treaties.[68] As regards the extraterritorial régime much also has been done to effect its early abolition. It seems proper in the present discussion to take it into account in connection with the application of the doctrine *rebus sic stantibus* to a system which is deemed by its very nature to become obsolete when the conditions under which it was concluded have been changed[69]

The extraterritorial régime established by the Powers in China dates back to the middle of the nineteenth century. It was set up and justified on the ground of the existence of a difference in legal systems between Occidentals and Orientals. At the very beginning of the present century China began her campaign to get rid of such an intolerable innovation by reforming her judicial system, and sought to abolish it by approaching the other parties concerned. In compliance with her desire,

[68] For a brief history of the negotiations, see *Survey of International Affairs,* 1928, pp. 418-432. For the texts of the new treaties, see *China Year Book,* 1929-30, Chapter XX.

[69] See Williams, *Chapters,* pp. 96-97.

the governments of the principal Powers possessing extraterritorial rights had favorably entertained such a suggestion nearly three decades ago. Thus the assurance was given and embodied in the Sino-British,[70] Sino-American,[71] and Sino-Japanese[72] treaties of 1902-03, the Sino-Portugese unratified treaty[73] of 1904, and the Sino-Swedish treaty of 1908,[74] to the effect that as soon as the state of affairs in China should warrant them in so doing, they would agree to the abolition of the system.

At the Paris Peace Conference of 1919, China made a bold attempt to secure the abolition of extraterritorial rights.[75] But the object of the Conference, as rightly declared by its President, Mr. Clemenceau, on behalf of the Supreme Council of the Principal and Associated Powers, was the formulation of Treaties with enemy countries, not the undertaking of the greater task of world order. Therefore no action was taken by the Conference on the question, and the *status quo* was maintained.

At the Washington Conference of 1921-22, China again attempted to approach the Powers for their common consent to the abolition of the régime, setting forth

70 MacMurray, *Treaties,* Vol. I, p. 351, see Article XII.

71 *Ibid.,* p. 431, see Article XV.

72 *Ibid.,* p. 414, see Article XI.

73 *Ibid.,* p. 374, see Article XVI.

74 *Ibid.,* p. 745, see Article XI.

75 For the text regarding the abolition of the Consular Jurisdiction submitted by China to the Peace Conference at Paris, April, 1919, see Tyau, *China Awakened* (The MacMillan Company, New York, 1922), pp. 441-445.

her wishes and reasons.[76] Accordingly a resolution was adopted by the Conference to the effect that a Commission should be established to investigate the condition of extraterritorial jurisdiction and the laws and judicial system in China, with a view to working out an ultimate solution of the problem. The Commission, however, was not summoned until 1926, and it then issued a report[77] which seemed to be discouraging for China's position.

In the meantime, since the conclusion of the Great War, China has rid herself of a greater part of the régime of extraterritoriality, either by diplomatic negotiations, or through the effect of war. Germany and Austria-Hungary lost theirs by the Treaties of Peace in 1919, and Russia gave up hers by the conclusion of a mutual treaty with China in 1924. In short, up to the present time, there are only a few Powers which insist on maintaining the *status quo* of the extraterritorial régime.

The negotiations for the relinquishment of extraterritoriality in China reveal the practical difficulty in the application of the doctrine *rebus sic stantibus,* even in its practicable sphere. Neither authorities on international law nor governments of civilized states would defend the system of extraterritorial rights as a permanent régime which could not be affected by changes in the circumstances under which the system was advocated and

[76] For the Chinese statement see Willoughby, *China at the Conference,* pp. 114-118.

[77] See *Report of the Commission on Extraterritoriality in China* (Washington, 1926).

brought into existence. For example, even the traditionally conservative government of Great Britain made known its intent to abolish the system early in 1902, as shown before. Of greater significance is its memorandum of December 18, 1926, in which it admits frankly that the treaties existing in China are now "in many respects out of date" and declares that the Powers should grant "a sympathetic adjustment of treaty rights to the equitable claims of the Chinese."[78] in fact, the question "whether the state of China's laws has been brought up to the international standards of justice or not" is merely a question of opinion which constitutes the chief impediment to the early solution of the problem.

### (c) *Miscellaneous Cases of Mutual Recognition of the Operation of the Doctrine*

Enough has been said of the instances in which the doctrine has been invoked diplomatically or politically. Attention may now be called to a few recent instances in which the validity of the doctrine for the revision or termination of treaties has been explicitly recognized by the parties concerned in adjusting their treaty rights and obligations.

One of the first instances was the case of the revision in 1913 of a treaty made in 1909 by Switzerland with Germany and Italy relative to the Saint Gothard Railroad.[79] The treaty of 1909 concerning the Saint Gothard

[78] For the full text, see *Current History*, vol. 25 (February, 1927), pp. 735-755.

[79] See Scelle in *Revue général de droit international public*, Vol. XX (1913), pp. 484-505. Cf. *ibid.*, Vol. XVIII, pp. 46-69.

Railroad was signed at Bern by the Swiss Confederation, Germany and Italy. Originally the scheme for the construction of such a railroad had been provided for in the treaties of 1869 and 1878 between the same parties, in which it was stipulated that money should be contributed by the parties to a company constituted for the purpose. In 1897 the Swiss Government nationalized her railroad system, and wished to withdraw from the obligations of the treaties. In 1909 she succeeded in negotiating a new treaty with Germany and Italy, by which she regained her sole administrative rights over the road by promising to Germany and Italy the most favored treatment on this road and other transalpine lines. However, in spite of this new treaty, popular agitation continued in Switzerland in opposition to the new treaty. It was said that the treaty of 1909 was irreconcilable with the permanent status of the neutrality of Switzerland and prejudicial to the economic activities of the country. Moreover, as Professor Speiser, counsel to the Swiss Government, argued, the object of the treaty of 1869 for the construction and exploitation of a railroad across the Saint Gothard had been frustrated after the nationalization of the railroad system in Switzerland. For these reasons, popular sentiment demanded a release from the treaty obligation. Finally, Germany officially recognized the changed conditions and gave her consent.[80]

[80] However, it is worth observing here that in the tripartite treaty relative to the Saint Gothard Railroad it was provided that differences involving the application of treaties should, upon the demand of either party, be submitted to arbitration. Such a device is commendable in view of the frequent possible

Other instances may be found in the Treaty of Versailles of 1919. Article 31 concerning the abrogation of the neutrality of Belgium provides:

> Germany, recognizing that the Treaty of April 19, 1839, which established the status of Belgium before the war, no longer conforms to the requirements of the situation, consents to the abrogation of the said treaties . . . [81]

Article 435 of the same treaty, relating to the status of the neutral zone of Savoy, provides:

> The High Contracting parties, while they recognize the guarantees stipulated by the Treaties of 1915, in favor of Switzerland, the said guarantees constituting international obligations for the maintenance of peace, declare nevertheless that the provisions of these treaties, conventions, declarations and other supplements of Acts concerning the neutralized zone of Savoy, as laid down in paragraph 1 of Article 92 of the Final Act of the Congress of Vienna and in paragraph 2 of Article 3 of the Treaty of Paris of November 20, 1815, are *no longer consistent with present conditions.* For this reason the High Contracting Parties take note of the agreement reached between the French Government and the Swiss Government for the abrogation of the stipulations relating to this zone which are and remain abrogated.
>
> The High Contracting Parties also agree that the stipulations of the Treaties of 1815 and of the other supplementary Acts concerning the free zones of Upper Savoy and the Gex district are *no longer consistent with present conditions,* and that it is for France and Switzerland to come to an agreement together with a view to settling between themselves the status of these territories under such conditions as shall be considered suitable by both countries.[82]

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controversies arising from changed circumstances. See Garner's article, *loc. cit.,* p. 514.

[81] A.J.I.L., Vol. XIII (1919, supplement), pp. 161-162.

[82] See *ibid.,* pp. 378-379. Here we find the first case in which the validity of the doctrine is diplomatically recognized not only by the parties con-

The dissolution of the Pact of London of April 26, 1915, after the disappearance of Austria-Hungary as a result of the Great War may be mentioned as an instance in which the treaty was naturally dissolved through the operation of the doctrine *rebus sic stantibus.* The Pact of London was an alliance treaty concluded by Great Britain, France and Russia with Italy during the Great War, in which the former Powers promised to Italy some territorial compensations in the Adriatic Sea in case the latter joined the Allies. One of the main preoccupations of this treaty was to provide a strategic frontier to prevent the aggression of Austria-Hungary. But, after the disappearance of Austria-Hungary as a result of the War, it might well be maintained that, by the application of the doctrine of *rebus sic stantibus,* the treaty was no longer operative.[83]

Another instance which may be cited here is the denunciation by Norway in 1924 of the treaty of Novem-

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cerned but by other parties which were not parties to the treaties. Italics in the text are mine. Even George W. Keeton, a vigorous antagonist of the doctrine, admits frankly that this case was "a plain and uncontroversial instance of the application of the doctrine to obligations arising under treaties." See B.Y.I.L., 1929, p. 115.

[83] Fauchille, *Droit international public,* I, pt. iii. p. 387. In this connection another case may be mentioned as a recognition of the validity of the doctrine by statesmen. In the declaration of the obsolescense of Secret Treaties with Russia, Lloyd George stated in 1918: "As new circumstances, like the Russian collapse and the separate Russian negotiations, have changed the conditions under which those arrangements were made, we are, and always have been, perfectly ready to discuss them with our Allies." Here a statesman explicitly recognized that changed conditions may render a treaty out of date. See *Cambridge History of British Foreign Policy,* Vol. III, p. 523.

ber 2, 1907, with Great Britain, France and Germany, relative to the guarantee of the territorial integrity of Norway. Norway denounced the treaty on the ground that the events of recent years had brought about a change in the international situation, which was altogether unlike that existing at the time in which the treaty was concluded. Accordingly, with an exchange of notes the treaty was terminated by common consent.[84]

A declaration of the Soviet Government of Russia in April, 1924, gave another recognition to the doctrine. In this declaration, the Soviet Government questioned the validity of all existing treaties between Russia and other Powers in view of the changed international situation, although she did not consider them as necessarily abrogated.[85]

A still more interesting case in recent diplomatic history is the voluntary rendition of concessions in China by the British Government in the last few years: notably the rendition of the Chinkiang concession in October

[84] See Fauchille, *op. cit.*, p.387. Lauterpacht points out in his *Private Law Sources and Analogies of International Law* (p. 172 foot note) that the treaty in question expressly reserved to Norway the right of denunciation. But this is immaterial here. The important point is the reasons advanced by Norway for the termination of the said treaty.

[85] See *Bulletin intermédiaire international,* 1924, Vol. XI, p. 154. Compare the criticism made by Eugene A. Korovin in A. J. I. L., vol. 22 (1928), pp. 762-763, wherein he observes that the Soviet doctrine towards treaty obligations "appears to be an extention of the principle of *rebus sic stantibus*, while at the same time limiting its field of application by a single circumstance—the social revolution." *Ibid.*, p. 763.

1929,[86] and that of Weihaiwei in 1930.[87] For the sake of brevity, attention may be confined to the latter.

The history of this affair began in 1898, during the "scramble for concessions" in China. Because of its strategic position, Weihaiwei was leased by Great Britain from China shortly after the occupation of Port Arthur by Russia and of Kiaochow Bay by Germany, for the purpose of providing Great Britain with a suitable naval harbor in North China. Evidently, the object animating Great Britain to require a lease from China was an intention to maintain a balance of power in the Far East, especially in view of the already existing influence of Russia and Germany. However, after the Russo-Japanese War, the Russian naval base of Port Arthur was transferred to Japanese hands, with the result that Czarist influence in North China was considerably hampered. As a result of the Great War, Germany was in turn eliminated from North China. As a result of these two incidents, the concession was no longer considered necessary by Great Britain.

At the Washington Conference of 1921-22, partly on account of the Chinese agitation for the recovery of all concessions leased to other powers and partly due to British farsightedness in foreign policy after the great

[86] For evidence see the exchange of notes between China and Great Britain relating to the rendition of the British Concession in Chinkiang in *Chinese Social and Political Science Review,* Vol. XIII, April, 1930, pp. 13-19.

[87] See an article appearing in *China Critic,* Vol. III (August 7, 1930), pp. 753-755.

calamity, Great Britain on her own initiative proposed to restore Weihaiwei to China in order to facilitate the settlement of the Shantung question.[88] Lord Balfour, on behalf of the British Government, states:

> The circumstances under which Weihaiwei thus came under the control of Britain have now not only provisionally changed, but they have altogether disappeared. The rest of the province of Shantung is now handed back under suitable conditions to the complete Sovereignty of China. Under like suitable conditions I have to announce that Great Britain proposes to hand back Weihaiwei to the country within whose frontier it lies.[89]

Following Lord Balfour's declaration, negotiations were carried on at various times between China and Great Britain for the retrocession of the territory. But owing to political upheavals in China for several years nothing resulted. However, in 1930, the National Government again opened negotiations with the British Minister, Mr. Lampson, and as a result the Wang-Lampson Agreement was finally reached and signed on April 18, 1930.[90] Therefore, it may be said that the effect of changed circumstances upon treaty stipulations was first officially recognized by the British Government, and then, as a result, a common agreement was brought about and the obsolete treaty accordingly terminated.[91]

[88] See Willoughby, *op. cit.*, pp. 188, 191. It should be observed here that France also made a similar proposal for the rendition of Kwangchowwan. See *Ibid.*, pp. 183, 192.

[89] *Conference on The Limitation of Armament—Senate Document No. 126, 67th Congress, Second Session* (Washington, D. C., 1922), p. 828.

[90] For the full text of the agreement, see the official section in *China Critic*, May 15, 1930.

[91] It is worth observing here, however, that the Treaty between China and Great Britain of 1898 provided that the lease should be valid only for

## § 3. *Summary Observation*

Enough has been said to show the importance and delicacy of the problems raised by the doctrine. It seems that there are no general rules for determining the scope of the doctrine. Each case has its own peculiar circumstances and must needs be judged upon its own merits. This uncertainty in the application of the doctrine is chiefly due to the defective development of international order as already indicated above. In the past there was no competent international court or common judge to determine in controverted cases whether the application of the doctrine was justified or not, or to set aside oppressive treaty obligations. Nor was there any international legislature[92] to regulate inter-state engagements in the manner of legislative regulation of contracts within a state in the interests of social order. In the absence of an international organ to adjust treaty rights and obligations, states under burden naturally sought to invoke the doctrine *rebus sic stantibus*. It was particularly so, as we have already seen, when a state felt the necessity of

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25 years. Thus it had already expired in 1921. But at any rate, as compared with the attitude of those Powers whose treaties with China also expired some years ago, the British policy towards China in this incident is highly esteemed in diplomatic circles in the Far East.

92 Except that one case may be mentioned as a sort of international legislative interference; that is, when the "Concert of Europe" at Berlin in 1878 claimed to void the Treaty of San Stefano as inconsistent with the higher interests of the World at large. But, such an instance may be better called international collective intervention rather than international legislative interference, for the "Concert of Europe" was constituted *ad hoc* just for the temporary purpose of checking Russian territorial ambition but not intended to exercise such power consecutively.

being released from treaty obligations imposed upon it after a defeat in war. Since such treaty obligations were usually intended to be oppressive and inequitable at the time of their conclusion, and the issues arising from them, as already indicated, were in nature non-justiciable, it would seem that the only possible means for the solution of the problem of politically oppressive treaties would be to rely, in part at least, upon some international quasi-legislative action. This was foreshadowed by the authors of the Covenant of the League when they embodied Article XIX in the Covenant. In the following chapter, attention will be devoted to the consideration of such a solution as is offered in this Article.

## CHAPTER IV

### Rôle of the Doctrine in the Covenant of the League of Nations

### § 1. *Introduction*

As we have seen in the last chapter, the doctrine of *rebus sic stantibus* has been invoked by states chiefly upon political grounds. Under the old system of international relations prior to the League, there were only three ways of adjusting contractual rights and obligations among states. War, or threat of war, was one way. The second was by means of occasional conferences of Great Powers, such as that which took place in Berlin of 1878. But this method of legislation by conferences is a precarious one, for it has no continuity and depends upon the Great Powers alone. Finally, there is the method of diplomatic negotiation. But, as we have seen, this method can be successfully employed only on those occasions when national intereste are not at stake and in dealing with those treaties which are minor in character. Consequently, the readjustment of international contractual rights and obligations among nations has long been one of the most difficult problems of international society, especially with reference to those treaties which provide no means of termination or revision. It was due to this difficulty that the need for a means of providing periodical reconsideration of treaties has been pressed. It was this conviction of the desirability of adjusting obligations

to changed conditions that led to the embodiment of the principle of revision in the Covenant of the League. Thus, in contrast with the Treaties of Westphalia, of Utrecht, of Vienna and of Berlin, which made no provision for changing conditions and included no clauses of revision, the Treaty of Versailles of 1919 allows the International Labor Organization to change part XIII, gives the Reparations Commission wide powers, concedes authority in a number of cases, such as frontiers, to the Principal Allied and Associated Powers, and provides for the amendment of the Covenant of the League of Nations.

For our present purpose, in connection with our discussion of the doctrine of *rebus sic stantibus,* attention will be chiefly confined to an examination of Article XIX of the Covenant which, as we shall see, is the new development of our doctrine. For the sake of clarity the writer deems it necessary to recall, to some extent, the history of the Article before dealing with its actual operation and its practicability as a solution of the problem of changing obsolete treaty obligations.

### § 2. *Origin of Article XIX*[1]

1. *Genesis.* The Article formed no part of the Phillimore's plan of March 20, 1918. The idea of it first appears in Colonel House's draft of July 16, 1918, as a

[1] Practically, as investigation shows, no idea regarding Article XIX can be found in the original drafts or projects submitted by different Governments or organizations to the Peace Conference of 1919; and, moreover, as will be later seen, in the course of the discussions of the Covenant in the Commission of the League of Nations, the Article received but scant con-

corollary to the following provision which subsequently became Article X of the Covenant. In this draft it is provided:

> The Contracting Powers unite in several guarantees to each other of their territorial integrity and political independence, subject, however, to such territorial modifications, if any, as may become necessary in the future by reason of changes in present racial conditions and aspirations, pursuant to the principle of self-determination and as shall also be regarded by three fourths of the Delegrates as necessary and proper for the welfare of the peoples concerned; recognizing also that all territorial changes involve equitable compensation and the peace of the world is superior in importance and interest to questions of boundary.[2]

President Wilson's first draft, made in the late summer of 1918, had for its basis the suggestions of Colonel House. It included the above provision with some verbal changes. President Wilson added a reference to social and political relationships to Colonel House's "racial conditions and aspirations", and made the territorial changes

sideration. The only project which contained such provision as contemplated in Article XIX may be found in the Fabian project proposed in 1916 by the Fabian Society. See L. S. Woolf, *International Government,* pp. 402-405. Article 16a of the project provided that any constituent state has the right to bring before either the "International High Court" if it is a justiciable issue or the "International Council" if it is a non-justiciable issue any treaty or agreement to have it declared to be obsolete, wholly or in part, under certain conditions. The conditions were set forth as follows: "By reason of the subsequent execution of another Treaty or Agreement by which the earlier Treaty or Agreement has been substantially abrogated, or by reason of one or the other independent Sovereign States concerned in such Treaty or Agreement having ceased to exist as such, or by reason of such a change of circumstances that the very object and purpose for which all the parties made the Treaty or Agreement can no longer be attained." See *ibid.,* pp. 402, 403.

[2] Miller, *The Drafting of the Covenant,* Vol. II, p. 10 (Article 20).

depend, not only upon the judgment of three fourths of the delegates, but also upon the agreement of the peoples concerned.[3] This provision was retained in President Wilson's second draft of January 10, 1919,[4] made in the light of General Smuts' pamphlet of December 16, 1918, as well as in Wilson's third draft of January 20, 1919.[5] In fact, the idea of the need for some means whereby the League could bring about changes in out-of-date treaties was clearly held by President Wilson at this time. Thus, according to a note taken by Dr. Isaiah Bowman, Wilson, on his way to Paris on December 10, 1918, said: "As for the League of Nations, it implied political independence and territorial integrity plus later alteration of boundaries if it could be shown that injustice had been done or that conditions had changed."[6]

At the same time a printed draft sketch of a League of Nations, dated January 14, 1919, a revision of the draft of which Lord Robert Cecil had circulated to the War Cabinet on December 17, 1918,[7] provided that regular conference of Members of the League would "pay special attention to any difficulty which might seem to threaten the peace of the world."[8] Later, the British Draft Convention, dated January 20, 1919, submitted by Lord Robert Cecil, included the following provision:

[3] *Ibid.*, II, p. 12.
[4] *Ibid.*, II, p. 70.
[5] *Ibid.*, II, p. 99.
[6] *Ibid.*, I, p. 42.
[7] *Ibid.*, I, p. 51.
[8] *Ibid.*, II, p. 61.

If at any time it should appear that the boundaries of any State guaranteed by Article 1 (i), (ii) do not conform to the requirements of the situation, the League shall take the matter under consideration and may recommend to the parties affected any modification which it may think necessary. If such recommendation is rejected by the parties affected, the States, members of the League, shall, so far as the territory in question is concerned, cease to be under the obligation to protect the territory in question from forcible aggression by other States, imposed upon them by the above provision.[9]

Finally, this provision was amalgamated with the corresponding article of President Wilson's second Paris draft in accordance with a suggestion made by Lord Eustace Percy.[10]

So far, the foregoing account clearly indicates that the idea of Article XIX originated in England, and then, through the acceptance of President Wilson, was introduced in the Peace Conference of 1919. As a result, in the Cecil-Miller draft, agreed upon January 27, 1919, between Davis Hunter Miller and Lord Robert Cecil, the following article appears:

The High Contracting Powers undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all States, members of the League.

If at any time it should appear that any feature of the settlement made by this covenant and by the present treaties of peace no longer conforms to the requirements of the situation, the League

[9] *Ibid.*, II, p. 107. On January 21, 1919, in a talk with Miller, Lord Robert Cecil again emphasized the need for some such provision. He said that "treaties could not be made immutable and that that point should be recognized, and possibly a provision could be made for revisions generally, not specifically, relating to boundaries, at intervals from time to time." See *ibid.*, I, p. 52.

[10] *Ibid.*, II, pp. 118-9.

shall take the matter under consideration and may recommend to the parties any modification which it may think necessary. If such recommendation is not accepted by the parties affected, the States, members of the League, shall cease to be under any obligation in respect of the subject matter of such recommendation.

In considering any such modification the League shall take into account changes in the present conditions and aspirations of peoples or present social and political relations, pursuant to the principle, which the High Contracting Powers accept without reservation, that Governments derive their just powers from the consent of the governed.[11]

The last two paragraphs quoted above were left out of the Hurst-Miller draft, which was the basis of discussion before the Commission of the League of Nations, and the remainder became Article X of the Covenant.[12] This omission was accepted by President Wilson in his fourth draft of February 2, 1919.[13]

2. *Development.* It was not until the discussion of the Covenant at the fourth meeting of the Commission of the League of Nations that the idea of Article XIX again reappeared. At this meeting Lord Robert Cecil suggested the insertion of a provision for the periodical revision of international obligations, and it was this suggestion which led directly to the insertion in the Covenant of what is now Article XIX.[14]

Thus, in the eighth meeting of the Commission held on February 11, the British delegates proposed the following text:

[11] *Ibid.*, II, p. 134 (Article III).
[12] *Ibid.*, I, p. 71. Compare, *ibid.*, II, pp. 131-154.
[13] *Ibid.*, II, p. 145 *et seq.*
[14] *Ibid.*, I, p. 169.

The Body of Delegates shall make provision for the periodical revision of treaties which have become obsolete and of international conditions, the continuance of which may endanger the peace of the world.[15]

During the discussion of this matter at this meeting the Czecho-Slovak delegate observed, that, if he Body of Delegates were to become the judge of all treaties, it would have powers like those of an international parliament. To this Lord Robert Cecil replied that, since the Body of Delegates could not act except by unanimous vote, there could be no objection on such score. Miller comments on this point that Cecil's reply did not answer the constitutional point; for, "by the fundamental laws of many countries, the revision of a treaty requires legislative assent." Accordingly, Miller wrote President Wilson a note: "That, if the draft gave more power than recommendation, it was bad; or, in other words unconstitutional."[16]

Finally, the Article was adopted in the following form, proposed by President Wilson:

It shall be the right of the Body of Delegates from time to time to advise the reconsideration by the States, members of the League, of treaties which have become inapplicable and of international conditions, the continuance of which may endanger the peace of the world.[17]

Upon this proposed draft, Davis Hunter Miller adds the following comment:

[15] *Ibid.*, I, p. 202.
[16] *Ibid.*, I, p. 203.
[17] *Ibid.*, I, p. 203.

Under the existing wording, indeed, the very interesting question has been suggested as to whether unanimity is required; it is argued that to "advise reconsideration" binds no one and so that such action is not to be regarded as a "decision" under Article V of the Covenant.[18]

On February 13, 1919, at the tenth meeting of the Commission, over which Lord Robert Cecil presided, the Article, with slight verbal changes, was incorporated as Article XXIV in the Draft Covenant.[19]

On March 18, 1919, when President Wilson, after returning to Paris from the United States, conferred with Lord Robert Cecil and Colonel House regarding possible changes in the Covenant, Lord Robert Cecil suggested that the undertaking in Article X should be made subject to the provisions of Article XIX. Wilson objected on the ground that Article X was the one upon which the French relied for security. Consequently, the change was not made.[20] In the end, Article XIX of the Covenant was approved in substantially the same form as the draft of March 26, 1919,[21] and took its final shape in the text received by the Commission from a drafting committee on April 5, 1919.[22] Finally, it formed part of the Covenant, which was accepted by the Peace Conference on April 28 and incorprated in the Treaty of Versailles on June 28, 1919.

18 *Ibid.*, I, the same page.
19 *Ibid.*, II, p. 335.
20 *Ibid.*, I, p. 289.
21 *Ibid.*, II, p. 657.
22 *Ibid.*, II, p. 679.

3. *Summary.* In this connection it is worthy of notice that a study of the origin of the Article in question shows a new and progressive point of view towards the solution of the problem relative to treaties of peace. The separation of the qualification clause of treaty revision from the flat assertion of territorial guarantee has without doubt proved one of the most decisive factors in the history of the League of Nations. This serves to show clearly the steps taken by the auhors of the Covenant, particularly through the influence of the British delegates —how they first indorsed and coupled the principles of territorial guarantee and treaty revision, then eliminated the latter, and, finally, brought about a compromise whereby Article XIX of the final Covenant was supposed to offset Article X.

Evidently, such an intimate relationship between guarantee against external aggression and peaceful readjustment of treaty obligation in the mind of the authors of the Covenant was based on the assumption that some international constitutional machinery must be provided for the peaceful adaptation of international obligations to the changing exigencies of political evolution. In the past there had been no such machinery to adjust treaty rights and obligations. The only way the aggrieved state could take was denunciation or warlike action, which, strictly speaking, amounted to an open breach of international engagements. Viewed from this particular angle, the desire to mitigate the rigor of strict observance of international treaties as manifested in Article XIX of the Covenant is as intelligent a scheme as has been provided

for the solution of the difficult problems arising from obsolete treaties. However, in order to determine whether the machinary provided by the Article is effective or not, an examination of the records of the application of the Article is necessary.

### § 3. *Application of Article XIX*

Article XIX of the Covenant was first invoked in 1920 when Bolivia requested the Assembly of the League to give its advice as to the reconsideration of the Treaty of 1904 with Chile. In this request, Bolivia pleaded that the treaty in question was inapplicable under the language of Article XIX.

This request made by Bolivia to the First Assembly of the League on November 1, 1920, contained the following statements:

(1) That the Treaty was imposed upon her by force;

(2) Failure to carry out certain fundamental Articles of the Treaty which aimed at securing peace, for which failure Chile was to blame;

(3) This state of affairs involves a permanent menace of war. This may be proved by the present mobilization of large Army Corps, which is being carried out by Chile on the Bolivian frontier, in spite of the fact that these countries are at peace;

(4) As a result of the Treaty of 1904, Bolivia is now entirely shut in and deprived of all access to the sea.[23]

This request did not come before the Assembly until near the close of its meeting on December 16, 1920.[24] Bolivia, knowing that the Assembly would not have time

[23] See *Records of the First Assembly—Plenary Meetings*, 1920, p. 595-580.

[24] *Ibid.*, p. 580.

to consider the question, requested, on the same date, that the question should be placed on the Agenda of the next Session of the Assembly. That suggestion was strongly opposed by the Chilean delegate, Sr. Huneeus, on the ground that this would pre-judge in some way the competency of the Assembly to deal with disputes between Chile and Bolvia. He intimated that neither the League of Nations nor the Assembly could interfere in any way in such affairs. However, the President of the Assembly, after answering that nothing in this action was in any way pre-judged, ordered the Secretary-General to take action in accordance with the rules of procedure of the Assembly.[25]

In the Second Assembly, the item was inserted in the Agenda. This again raised strong opposition from Chile's delegate, Mr. Edwards, who strenuously opposed the consideration of Bolivia's demand for the revision of the Treaty. He declared that Chile based her opposition on a conclusive reason: "the absolute and radical incompetence of the League of itself to revise treaties and especially treaties of peace." Moreover, Chile's delegate emphasized that Bolivia's request for the revision of the treaty, would tend to destroy the political and legal systems which the Allied and Associated Powers had defended on the field of battle.[26]

[25] *Ibid.*, pp. 580-581.

[26] See *Records of Second Assembly — Plenary Meetings, 1921*, p. 45. Cf. the statement made by Chile's delegation to the League of Nations under the title, *de la non révision des traités de paix* (*Genève*, 1921), *passim*.

However, in compliance with Bolivia's request, a Committee of Exports was appointed by the Assembly to study the question. As a result, the Committee made a report as to the competence of the Assembly of the League under Article XIX with regard to the question of revision of treaties and the scope of the application of the Article in the Covenant. The report read, in part, as follows:

> That, in its present form, the request of Bolivia is not in order, because the Assembly of the League of Nations cannot of itself modify any treaty, the modification of treaties lying solely within the competence of the contracting States;
>
> That the Covenant, while insisting on scrupulous respect for all treaty obligations in the dealings of organized peoples with one another, by Article 19 confers on the Assembly the power to advise (the French word in the Covenant is "inviter"—that is to say "invite") the consideration by members of the League of certain treaties or the consideration of certain international treaties;
>
> That such advice can only be given in cases where treaties have become inapplicable—that is to say, when the state of affairs existing at the moment of their conclusion has subsequently undergone, either materially or morally, such radical changes that their application has ceased to be reasonably possible, or in cases of the existence of international conditions whose continuance might endanger the peace of the world;
>
> That the Assembly would have to ascertain, if a case arose, whether one of these conditions did in point of fact exist.[27]

Chile's delegate accepted this interpretation. Bolivia likewise accepted, but reserved the right to submit its demand anew at any time to the League of Nations in accordance with the principles and form laid down by

[27] *Ibid.*, p. 466.

the Covenant.[28] Thereupon Bolivia withdrew her request and so the matter was dropped.

In effect, according to the opinion of the Committee, the Assembly of the League of Nations could not by itself modify any treaty. The Committee pointed out that the amendment of treaties still remained within the exclusive competence of the contracting states, and that the Article could be invoked and the Assembly could give advice as to the applicability of the Article in question only in those cases where treaties had become inapplicable on account of radical changes of conditions or there had arisen international condition whose continuance might endanger the peace of the world.

At the same time, Peru, with the same view, also appealed to Article XIX before the Assembly for the revision of a treaty of peace of 1883 with Chile. But the same action was taken, and nothing decisive resulted.[29]

It was not until the Sixth Assembly, in 1925, that Article XIX again came into play through the request of the Chinese delegation for the revision of the so-called "unequal treaties." In her request, China appealed to the League merely for its moral support as envisaged in Article XIX of the Covenant.[30] However, as the official records reveal, no action was taken with regard to the Chinese request. Two draft resolutions, originally

[28] *Ibid.*, pp. 467-469.

[29] See *Records of the First Assembly—Plenary Meetings*, 1920, pp. 580-581, 596-597.

[30] See *Records of the Sixth Assembly—Plenary Meetings*, 1925, p. 102.

submitted by the Chinese delegation, were left in the records, and the wording of these resolutions deserves notice. The first draft submitted on September 14, 1925, reads as follows :

> The Assembly, having heard with keen interest of the Chinese delegation's suggestion regarding the applicability of Article 19 of the Covenant to the existing situation in China, having learned with satisfaction that a conference of the interested States is soon to take place in China to consider the questions involved, expresses the hope that a satisfactory solution may be found at an early date.[31]

However, in the final draft presented before the Assembly on September 22, 1925, Article XIX was not mentioned. It read merely as follows:

> The Assembly, having heard with deep interest the Chinese delegate's suggestion regarding the possibility of considering, according to the spirit of the Covenant, the existing international conditions of China, having learned with satisfaction that a conference of the interested States is soon to take place in China to consider the questions involved, expresses the hope that a satisfactory solution may be reached at an early date.[32]

The reason for the change of wording was not publicly known.[33] But in view of the inaction of the Assembly on this occasion and judging from the form of the final draft, the attempt to invoke Article XIX may be deemed to have proved futile.

[31] *Ibid.*, p. 79.

[32] *Ibid.*, p. 102.

[33] It is said in *China and the Leaque* (Shanghai, 1928) written by Mr. Hsia Chi-feng, a Chinese who served several years in the Information Section of the Secretariat of the League, that the Chinese delegation was compelled to withdraw the Article from the final draft through the persuasion of the Great Powers. See pp. 24-29.

In 1929 China again, through her representative, invoked Article XIX before the Tenth Assembly. However, at this time the Chinese delegation, knowing that the reluctance of the Assembly to apply Article XIX was chiefly due to the lack of effective means of enforcement, did not intend to invoke the Article for the immediate reconsiderttion of her unequal treaties, but report on the best methods of making Article XIX more effective.[34] To comply with the Chinese request the question was thereupon referred to the First Committee on September 14, 1929. As a result, on September 25, the Committee reported a resolution before the Assembly. The material portion of the report is as follows:

> The Assembly declares that a Member of the League may on its own responsibility, subject to the Rules of Procedure of the Assembly, place on the agenda of the Assembly the question whether the Assembly should give advice as contemplated by Article 19 regarding the reconsideration of any treaty or treaties which such Member considers to have become inapplicable or the consideration of international conditions the continuance of which might, in its opinion, endanger the peace of the world; declares that, for an application of this kind to be entertained by the Assembly, it must be drawn up in appropriate terms, that is to say, in terms which are in conformity with Article 19; (and) declares that, in the event of an application in such terms being placed upon the agenda of the Assembly shall, in accordance with its ordinary procedure, discuss this application, and, if it thinks proper, give the advice requested.[35]

The foregoing is a brief account of Article XIX after its embodiment into the Covenant of the League.

[34] See *Records of the Minutes of the Committees of the Tenth Assembly, 1929*, p. 113-114.

[35] See *Records of the Tenth Assembly Meetings, 1929*, p. 177.

Strictly speaking, not only has there been no concrete action taken for its effective application, but also there seems to have been no real proposal for putting it into effect on the part of the League. Thus, it is impossible at the present moment to attempt any appreciation of it from the legal point of view. Moreover, judging from the world situation which has been woven by the recent peace settlement, it seems that the history of Article XIX cannot be particularly promising in the immediate future. On the contrary, a few important loopholes have been revealed since its embodiment in the Covenant.

§ 4. *Criticism as to the Practicability of the Article*

(*a*). *General Applicability.* The first view of Article XIX which has been at all clarified concerns its general applicability to treaties other than that of Versailles. By some fastidious critics the loophole on this point is found in the original draft of the Covenant. In Article 3 of the Cecil-Miller Draft, after reiterating the obligation of the state members to guarantee against external aggression the territorial integrity and existing political independence of all state members of the League, the following clause is found :

> If at any time it should appear that any feature of the settlement made by this Covenant and by the present treaties of peace no longer conforms to the requirements of the situation, the League shall take the matter under consideration and may recommend to the parties any modification which it may think necessary. If such recommendation is not accepted by the parties affected, the States, members of the League, shall cease to be under any obligation in respect of the subject matter of such recommendation.[36]

[36] See Davis H Miller, *op. cit.*, Vol. I, p. 71.

At first glance, this seems to indicate that Article XIX was originally intended to apply simply to the Peace Treaties. However, in view of the precedent mentioned above when Bolivia, acting upon Article XIX brought forth a proposal to the Second Assembly of the League in 1921 for the reconsideration of a treaty which she made with Chile in 1904, this doubt has been clarified. For in this instance, upon Bolivia's request, the Assembly immediately set about a discussion and appointed a Committee to study the case. In the discussions there was no doubt as to the point that Article XIX might not be applicable to the case as presented. Moreover, in the findings of the jurists it could not be implied that the Article was devised merely for the purpose of revising the Peace Treaties of 1919. It is therefore quite clear that the original draft of the clause was not intended to limit in any manner the field of application of Article XIX. This was clearly confirmed when China invoked the Article in 1925 and 1929.

(*b*). *Unanimity Principle.* A question of considerable controversy concerning the practical value of Article XIX is whether the Assembly's invitation to advice the reconsideration of treaties which have become inapplicable, as envisaged in the said Article, should be adopted unanimously or by a simple majority of votes. Upon this point opinions are divided into two camps. On one hand, there are writers who defend the thesis that a unanimous vote is required to put the Article into operation. Two objections are raised against application of the majority rule. Legally, they argue, Article V of

the Covenant clearly declares that decisions at any meeting of the Assembly or of the Council shall require the agreement of all the members of the League represented at the meeting except upon matters of procedure. Upon practical grounds, they contend that on matters of such grave international importance as the reconsideration of a treaty the majority rule must be condemned and rejected.[37]

In particular, they observe that such action as envisaged by Article XIX of the Covenant cannot be classified merely as a *voeu*. For, to them, the distinction, as made by those who favor majority rule, between decision and invitation, is without real value because, before addressing the invitation, the Assembly must make the decision to invite.[38] Furthermore, they point out that there is no implication in the case of Article XIX which permits an exception to the unanimity rule.[39] Finally, they base their argument on the ground that the Assembly of the League had had occasion to fix its procedure in regard to any invitation and that it did it in

[37] See R. Genet's article in *Revue générale de droit international public*, 3rd series, tome iv, 1930, p. 307; and Williams in A.J.I.L., 1925, vol. 19, p. 482.

[38] See R. Genet, *loc. cit.*, p. 307. Williams seems to entertain such a view when he says: "For the present, at any rate, it is safe to say that the existing practice of the League must not be considered as settling that a decision to discharge this important special function of the Assembly is not a 'decision' within the meaning of Article 5, but merely a voeu." See Williams, *loc. cit.*, p. 482.

[39] See R. Genet, *loc. cit.*, p. 307; and Fauchille, *Traité de droit international public*, tome i, partie iii, p. 394. M. Radoikovitch makes an able argument upon this point. See his work, *La révision des traités et le pacte de la Société des Nations*, p. 260 *et seq.*

a way which confirms implicitly the language of Article V.[40]

On the other hand there are those who defend the thesis that the action of the Assembly under Article XIX of the Covenant may be taken by a bare majority.[41] With special reference to the argument of their opponents as to the provision of Article V of the Covenant, they hold that an invitation, as envisaged in the said Article, not being a decision but having rather the nature of the simple *voeu,* can be taken by a majority vote. Such a view, as has been pointed out, is perhaps rather more plausible in the English text than in the French text. For the former reads, "The Assembly may . . . advise the reconsideration by the members of the League of Nations"; while the latter reads merely: "L'Assemblée peut . . . inviter les membres de la société."[42]

As to the contention set forth above concerning the technical requirement for any action taken under Article XIX, the writer deems it necessary to refrain from a judgment, especially in view of the fact that there has been no decisive opinion or decisive action on the matter given either by the Assembly itself or by the Permanent

[40] See R. Genet, *loc. cit.,* p. 307. To this he cited the resolution of the Assembly of September 25, 1929, relative to the request of the Chinese delegation.

[41] See Schücking and Wehberg, *Die Satzung der Völkerbundes,* 2nd edition, pp. 335, 663; and Goellner, *La révision des traités sous le régime de la société des nations,* p. 86 *et seq.*

[42] According to Sir John F. Williams, an "invitation" is perhaps further removed than "advice" from a *voeu.* See Williams, *loc. cit.,* p. 482.

Court of International Justice.[43] Besides, although the theory of legal equality of states has been subjected to severe criticism; yet, as a matter of fact, the unanimity rule would still seem to be justified at the present stage of development of international society for two obvious reasons. First, at present, due to the apparent lack of competent international legal organization, there is need for a rule to safeguard the legal independence of states. In other words, no independent state can be compelled,

[43] So far as the writer is aware, there has been only one case referred by the Council to the Permanent Court of International Justice involving the matter of unanimity rule. See Advisory Opinion No. 12 of the Court. This was a case concerning the interpretation of Article 3, paragraph 2, of the Treaty of Lausanne (1923) between Turkey and Great Britain. In referring the case to the Court, the Council asked the Court's opinion as to the nature of the decision with special reference to the clause in the Treaty: Whether it was to be taken unanimously or by a majority and whether the interested parties might take part in the vote. The Court, after a detailed examination of the Treaty of Lausanne and the Covenant, arrived at the conclusion that the Council's decision in the case in question, in conformity with Article XV of the Covenant, was to be a recommendation, but that this recommendation, having been accepted in advance by the Parties, would be binding upon them and would constitute a final determination of the frontier between Turkey and Iraq. The Court advised, further, that that decision was to be unanimous, in the sense that the Parties' representatives might vote, but that their votes should not be counted for the purpose of establishing unanimity. The Court's opinion was adopted by the Council, and, subsequently, a treaty was concluded between Great Britain and Turkey finally settling the Turkish frontier in the Mosul region. This opinion given by the Court seems to be of intrinsic value in view of the definiteness of its decision not to count the votes of the parties interested as a requisite for unanimity. However, in view of the fact that even the judgments of the Court, not to speak of the advisory opinions, are binding on the parties and in respect only to the particular case, the opinion, though it is instructive and important, cannot be viewed as decisive. Moreover, as the advisory opinion given in the case is not directly concerned with the procedure of voting in the Assembly, it is going too far to take it as a precedent. Cf. Lauterpacht's appraisal of the opinion in *The Political Quarterly*, April-June, 1932, Vol. III, No. 2, p. 181.

without its own consent, to accept obligations. Secondly, in the existing society of nations, the rule is justified because there has not yet appeared an international legislature similar to municipal legislatures competent to adapt laws to changed conditions. In a word, in the present state of international organization, the abolition of the unanimity rule is highly improbable, since there are still cases in which it constitutes an indispensable guarantee of the essential liberties of states.[44]

It is observed, moreover, that, logically, some such general rule in international jurisprudence is still deemed necessary if the rules of international law are to be reduced to systematic and scientific statement.[45] In fact, international law has been built upon certain general postulates from which can be deduced certain international legal rights which the states lay claim to and the obligations which are imputed to them. In other words, in formulating any system of jurisprudence, be it constitutional or international, the general rule should be stated in such a manner as to be applicable to all permissible cases; but, when applied, it remains for jurists to seek the exceptions specially justified.

In the present instance, however, where the question involved concerns merely an invitation to certain mem-

[44] Compare Politis' *The New Aspects of International Law*, pp. 10-11. It is a regrettable fact that even in the records of the League of Nations Commission when the Article relating to the revision of treaties was discussed and introduced, the question as to whether or not unanimity is required was intentionally left out. See Miller, *op. cit.*, Vol. I, pp. 202-3.

[45] Compare W. W. Willoughby, *The Fundamental Concepts of Public Law* (1924), p. 324.

bers to consider treaties which have become inapplicable, it appears to be inconceivable that such an action should be taken as amounting to a decision as contemplated in Article V.[46] Moreover, such an action on the part of the League, as already observed by Williams himself,[47] cannot be considered as a legal obligation imposed upon the states thus invited to reconsider, and still less to revise, the treaty in question. As a matter of fact, such preliminary action, as vaguely contemplated in Article XIX, merely amounts to a friendly gesture on the part of the League to avoid disturbances of international peace and misunderstandings between nations. In matters like these, if the majority rule cannot be applied and the unanimity rule had to be observed by the League; then, the unanimity doctrine, though it is theoretically defensible in a majority of cases, becomes apparently a rule obstructive of the progress of humanity.[48]

[46] In fact, as subsequent records of the Article have shown (See Miller, *op. cit.*, Vol. I, p. 203) it had been argued in the Commission of the League of Nations that to "advise reconsideration binds no one and so that such action is not to be regarded as a 'decision' under Article V of the Convenant." Cf. Colonel House's draft of July 16, 1918, wherein the idea of three fourths of the delegates of Nations as necessary to effect modification of international conditions was suggested.

[47] See Williams, *loc. cit.*, p. 482.

[48] In truth the term "equal" used in international jurisprudence merely indicates the meaning of equal protection by the law, not as connoting actual equality of right and competencies. See Dickinson, *The Equality of States in International Law* (1920), pp. 3-5; and Lorimer. *Institutes of the Law of Nations,* Vol. I, p. 171. In fine the doctrine of legal equality of states should not permit any state to be a judge of its own cause on matters of international concern. Upon this point, see Lauterpacht's discussion in *The political Quarterly, cited above;* cf. also the *Twelfth Advisory Opinion of the Permanent Court of International Justice* in which the Court, though adhering strictly in the case to the requirement of unanimity (that is,

(*c*). *Ineffective Machinery.* Finally, the Article does not contain any definite workable machinery for carrying its principles into execution. Literally, Article XIX merely provides that the Assembly shall be given the power to advise "the reconsideration . . . of treaties which have become inapplicable" and "the consideration of international conditions whose continuance might endanger the peace of the world." Manifestly, the Article does not give the Assembly itself jurisdiction to revise treaties. As we have seen before, the Committee of Jurists in 1921 clearly pointed out that the Assembly cannot modify a treaty, but can merely advise its reconsideration. In other words they conceived that in the present order of international society the modification of treaties still remains within the exclusive competence of the contracting states. In short the Article is a declaration of principle rather than a piece of executive machinery.

This very ineffective method embodied in the Article has not escaped criticism. Thus, McNair observes that "the machinery offered by Article 19 is not such as to inspire confidence."[49] Higgins calls it "cumbersome".[50] Pollock, also, perceives the weak point of the Article and suggests that the Assembly or the Council might do better to appoint a permanent commission, meeting at

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save for the disputants), expressed the opinion that "no one can be judge in his own suit" and thus admitted that there were exceptions to a general rule. For the opinion, see above, foot note 43.

[49] In Oppenheim's *International Law* (4th ed.), Vol. I, p. 342.

[50] In Hall's *International Law* (8th ed.), p. 407.

stated periods and reporting to the Council.[51] In fact one of the main causes of the non-ratification by Great Britain and certain other states of the Geneva Protocol was the inadequacy of the machinery of Article XIX to prevent the stereotyping of the territorial *status quo* which a general guarantee would tend to bring about. In reality, as we have seen, there was no action taken by the League for the effective application of the Article. Up to the present the only attempt to make it more effective was, as referred to above, a proposal made by the Chinese delegation in the Tenth Assembly. The only result, however, was a resolution conceding to each member of the League the right to raise the question whether the Assembly should proceed in accordance with Article XIX. Such a decision may have political, but certainly had no legal significance.[52]

All in all, by virtue of Article XIX, the Assembly has no power to alter treaties, no matter how unjust their

[51] Pollock, *The League of Nations,* p. 172.

[52] As to the method suggested to make Article XIX effective, the Belgian proposal in the Tenth Assembly of the League of Nations, wherein it is suggested that "every member of the League has the right to draw the attention of the Assembly to a treaty which it considers inapplieable, and in such case the Assembly, having by the ordinary procedure verified whether the demand made to it is well founded, will pronounce upon the merits of the case after referring it to the Competent Committee." See *Minutes of the First Committee,* p. 45. Cf. a proposal made by the League of Nations Union in London, 1929, that the Council of the League should be empowered, within a period not exceeding two years, to consider whether a circumstance affecting the relations between states had not arisen within the meaning of Article XIX, if the parties to the treaty do not act upon the "advice" or recommendation within a reasonable time as suggested by a majority of the Members of the League. See the *Memorandum* issued by the Union (London, 1929).

terms may be. It does, however, have the power to focus the opinion of the world upon conditions which threaten to disturb world peace. Thus it is conceivable that, if world opinion should be virtually unanimous that a change in these conditions should be made, it would be very difficult for a power to decline the recommendations of the Assembly.

### § 5. *Article XI of the Covenant*

In this connection, it should be observed that, with reference to the problem of changing conditions, Article XI of the Covenant also offers a solution. However, as the problem raised by Article XI does not fall strictly within the compass of our discussion, a mere reference as to its relationship with Article XIX seems to be sufficient. First of all, both Articles raise the problem of changing conditions in regard to world peace. When paragraph 2 of Article XIX speaks of "the consideration of international conditions whose continuance might endanger the peace of the world", it has a language similar to that of the second paragraph of Article XI which stipulates, *inter alia,* that it is the right of each member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends. In short, both are aiming at the maintenance of peace by peaceful means. Secondly, as to the agency for their application, Article XI seems to be easier to put into application than Article XIX. For the body charged with the execution

of Article XIX is the Assembly, but the body for the application of Article XI is either the Council or the Assembly. Thus, so far as the means of enforcement are concerned, it is conceivable that Article XI has perhaps some advantage over Article XIX in view of the fact that it is the small body, the Council, which is primarily charged with the duty of taking action under it. Moreover, as indicated in its first paragraph, Article XI is wisely silent as to the specific steps that the Council ought to take in such an emergency. For this reason, it has repeatedly been used with the best results, notably when the Jugo-Slavs invaded Albania in 1921 and when the Greeks invaded Bulgaria in 1925.

But, as the *General Report of the First and Third Committees on Arbitration, Security and Reduction of Armaments* in the Fifth Assembly has shown, Article XI "confers no right on the Council or on the Assembly to impose any solution of a dispute without the consent of the parties.[53] Furthermore the First Committee of the Fifth Assembly declared explicitly that the new system, as strengthened by the Geneva Protocol, would not apply to "disputes which aim at revising treaties and international acts in force, or which seek to jeopardize the existing territorial integrity of signatory States."[54] In other words, according to the opinion of the Committee, Article XI could not be employed to change treaties in force. As a result, Article XIX was the sole article in the Covenant which could be employed for that purpose.

[53] See *League of Nations, A. 135, 1924,* p. 10.
[54] See *ibid.,* p. 700.

## § 6. *Principle of the Doctrine as Embodied in Article XIX — their Relationship*

Having considered the origin and the history of its application, we are now in a position to examine briefly the question as to whether Article XIX does in principle and in actual practice indorse the doctrine under consideration. At first glance, no doubt Article XIX seems to contain a sanction of the doctrine, for the expression in the Article that "treaties which have become inapplicable" clearly constitutes a reference to the change of circumstances on which the doctrine can be legitimately invoked.

There are, however, opponents of this thesis. Among this group, some hold that Article XIX is a negation of the doctrine, and others maintain that there is no relationship between the Article and the doctrine. Thus in maintaining the former view, Urutia considers that Article XIX presupposes the abrogation of the doctrine *rebus sic stantibus*.[55] The German jurist, Karl Strupp, regards Article XIX as a condemnation of the doctrine.[56] On the other hand, two eminent jurists sustain the view that there is no relationship between Article XIX and the doctrine. This view, though resting upon purely legal formalism, possesses somehow the advantage of discernment. For this reason, attention is particularly called to the views of these two writers.

According to Sir John Fischer Williams, a living English jurist, Article XIX does not and cannot embody

[55] In *Recueil de cour*, 1928, t. ii, p. 200.
[56] *Traité de droit international* (1930, in 3 volumes), t. i, p. 468.

the doctrine of *rebus sic stantibus*. His position, to which we have referred above, is the direct result of a different conception of the doctrine. His conception of the doctrine, as expressed in the *American Journal of International Law*,[57] may be summarized as follows: First, the doctrine is a legal one and not suitable for application by a political body such as the Assembly. Secondly, the doctrine does not give unilateral right to a party to declare itself freed from a subsisting contract. "It is not that one party has a right to break an existing tie, but that the tie itself is already broken."[58] Thirdly, he points out that Article XIX assumes that the treaty continues to subsist; if it does not subsist, it cannot be made the subject of reconsideration. Since, he argues, "the task of the Assembly is to 'advise' reconsideration . . . not only has the Assembly no power to declare the treaty obsolete or frustrated"[59] on the principle of *rebus sic stantibus,* "but the Article assumes that the treaty continues to subsist."[60] After subjecting the Article to careful legal scrutiny, he comes to the conclusion that "the ground covered by Article XIX is not that of the doctrine of *rebus sic* stantibus."[61]

M. Genet has developed the same view.[62] He contends that there is a manifest antilogy between the con-

[57] "The Permanence of Treaties" in A. J. I. L., vol. 22 (1928), pp. 89-104.

[58] *Loc. cit.*, pp. 91-2.

[59] *Ibid.*, p. 100.

[60] *Ibid.*, the same page.

[61] *Ibid.*, p. 103.

[62] See his article "Le problème de la clause *rebus sic stantibus*" *in Revue générale de droit international public*, 3rd series, tome IX, 1930, pp. 287-311.

ception of "caducity" and "revision." The theory of the doctrine aims at "caducity", while Article XIX, by speaking of "reconsideration of treaties", a term which indicates that the treaty continues to exist and has not lost its force, aims at "revision." With this conception, he concludes that there is no relationship between the operation of the doctrine *rebus sic stantibus* and the mechanism of Article XIX.

On the other hand, a great majority of jurists confirm the view that, in principle and practice, Article XIX actually indorses the principle of the doctrine. Thus McNair,[63] Higgins,[64] and Garner[65] hold that the term "inapplicable", which appears in Article XIX is only another way of putting the well-known doctrine *rebus sic stantibus*. Fauchille believes that the Covenant tried to regulate the application of the doctrine.[66] Dean Larnaude is more explicit: "In so far as the first part of Article XIX is concerned, the Covenant imposes upon the states, members of the League, only what formerly could come from the initiative of each of them. This is the situation known in international law as the clause *rebus sic stantibus*."[67] Professor Scelle considers that Article XIX is one of the means of solution of the famous problem of the clause *rebus sic stantibus*.[68] Even jurists who had occasion to examine the Article when it was invoked

[63] In Oppenheim's *International Law* (4th ed.), Vol. I, p. 343.
[64] In Hall's *International Law* (8th ed.), p. 407.
[65] In A. J. I. L., vol. 21 (1927), p. 510.
[66] *Traité de droit international*, t. i, 3rd partie, p. 393.
[67] *La société des nations* (Sirey, 1920), p. 40.
[68] *Le pacte des nations et sa liaison avec le traité de paix* (Sirey, 1919)

in 1920-1921 by Bolivia and Peru before the Assembly of the League uphold the same view. Thus John W. Davis, in considering the phrase "treaties which have become inapplicable", writes: "Treaties which come within the accepted limits of this principle of the doctrine of *rebus sic stantibus* may be considered as having become inapplicable and consequently ready to be examined by the Assembly in keeping with Article XIX".[69] Andre Weiss says: "Article XIX in its first part is bound to a rule of which modern international practice presents us with several applications which some under the Latin formula —*conventio omnis intellegitur rebus sic stantibus.*"[70] One could also cite in the same sense, Finlay, [71] Goellner,[72] and Radoikovitch.[73]

This interpretation is also confirmed by evidence, if one examines the successive stages of the formation of the Article. As we have seen, a study of its genesis shows that its authors had the principle of *rebus sic stantibus* in mind. Thus Colonel House's draft of the Covenant of July 16, 1918, Article 20, to which we have previously referred,[74] contains a very clear reference to the doctrine, notably the reference to future changes in territory. In his letter to President Wilson concerning the clause regarding future changes in territory, Colonel House again explicitly expressed the opinion that "it is quite con-

[69] See *De la non révision des traités de paix,* pp. 68-69.
[70] See *ibid.,* p. 110.
[71] *Ibid.,* p. 99 *et seq.*
[72] *La révision des traités sous le régime de la société de nations.*
[73] *La révision des traités et le pacte de la société des nations,* p. 243.
[74] See above, footnote 2 for reference.

ceivable that conditions might so change in the course of time as to make it a serious hardship for certain portions of one nation to continue under the government of that nation."[75] Such a statement clearly indicates the *raison d'être* of the doctrine.

In the same way, Wilson's first draft also mentioned territorial readjustments occasioned by a change in conditions. Article III of this draft began thus: "The Contracting Powers unite in guaranteeing to each other political independence and territorial integrity; but it is understood between them that such territorial readjustments, if any, as may in the future become necessary by reason of changes in present racial conditions and aspirations or present social and political relationships, pursuant to the principle of self-determination. . ."[76] Similar expressions are also found in the second[77] and third[78] American drafts. In the light of these records, it is logical to conclude that the principle of the doctrine had been accepted and formulated in the American projects.

Moreover, an examination of the British draft and the suggestion of Lord Robert Cecil leads to the same conclusion. In the British draft convention dated January 20, 1919, submitted by Lord Robert Cecil to the Commission of the League of Nations, the expression "do not conform to the requirements of the situation"[79] is a clear

[75] Davis Hunter Miller, *op. cit.*, Vol. I, p. 14.
[76] *Ibid.*, Vol. II, p. 12.
[77] *Ibid.*, II, p. 70.
[78] *Ibid.*, II, p. 99.
[79] See *ibid.*, II, p. 107.

reference to the doctrine. Furthermore, on several occasions when Lord Robert Cecil had conversation with David Hunter Miller, the doctrine was at times mentioned—notably on January 21, 1919, at the Hotel Majestic when he declared that "the treaties could not be intangible and that it was necessary to make this point recognized."[80] In the same sense reference also may be made to the British amendment to the Hurst-Miller draft, in which it was emphasized that a provision was being made "by the body of delegates for periodic revision of treaties which have become obsolete and of international conditions, the continuance of which may endanger the peace of the world."[81]

All in all one can see quite evidently in the genesis of Article XIX an abundance of proof for our thesis. It was particularly in view of the problem created by the doctrine that the authors of the Covenant attempted to find a solution and thus endorse the principle of the doctrine in the Article.

In practice, moreover, Article XIX has been interpreted to sanction the theory of the doctrine. As we have seen, on two occasions the Assembly was called upon to apply Article XIX and the resolutions adopted tended to show such an interpretation. Thus, in 1920 the Assembly declared that an invitation could be extended "in cases where treaties have become inapplicable — that is to say, when the state of affairs existing at the moment of

[80] See Wigniolle, *La société des nations et la révision des traités,* p. 36.
[81] Miller, *op. cit.,* II, p. 550, his observation on Article VII of Hurst-Miller draft.

their conclusion has subsequently undergone, either materially or morally, such radical changes that their application has ceased to be reasonably possible."[82] This definition of the term "inapplicable" confirms our view. In 1929 the resolution of the Assembly was even more explicit: "The Assembly, having heard with keen interest of the Chinese delegation's suggestion regarding the applicability of Article 19 of the Covenant to the existing situation in China . . . "[83] Such a reference on the part of the League to certain treaties formerly concluded between China and other Powers as incompatible with the present situation and with the meaning of Article XIX of the Covenant seems to be a recognition of the doctrine of *rebus sic stantibus.*

To be more specific, in conclusion let us examine again for a moment the views expressed by those who uphold the opposite thesis. According to the German jurist Karl Strupp, not only does Article XIX not sanction the doctrine but it is a condemnation of the doctrine. The reason, which he advances, is based on the fact that the League cannot have the power to dissolve international agreements but can at best only invite its members to amend them. Such a view is hardly convincing. From the fact that the League has, by virtue of Article XIX, only a power of invitation, it cannot be concluded that this Article is a condemnation of the doctrine. It can be inferred that the League is at present not a superstate. M. Radoikovitch, in discussing the theory of the

[82] For reference see above, footnote 27.
[83] For reference see above, footnote 31.

German jurist, has rightly observed: "To recognize or reject a principle is not the same as to recognize this same principle and to formulate a procedure to put its application into practice."[84]

M. Charles Dupuis in speaking of Article XIX says that the Covenant of the League of Nations has grazed the general question of the doctrine without mentioning it. Furthermore, he points out that the terms of Article XIX seem more favorable to the thesis of the Protocol of 1871 than to the Russian thesis of 1899, to the necessity of mutual dissent than to the application of the doctrine.[85] This opinion, as has been well observed,[86] shows a confusion between the nullity of a treaty and its revision. Stated generally in the law of contract, the former usually results from the operation of the doctrine — that is, obsolescence of contractual obligations through the lapse of time — and the latter can only be the work of the contracting parties. The fact that Article XIX aims at revision, however, does not imply the necessity of mutual dissent. Moreover, to say that Article XIX is more favorable to the thesis of the Protocol of 1871 than to the Russian thesis of 1899 is, in fact, to show the proper procedure for the application of the doctrine.[87]

Sir John Fisher Williams and Raoul Genet adhere to the view that the theory of the doctrine aims at caducity, while Article XIX, by speaking of "reconsidera-

[84] Radoikovitch, *op. cit.*, p. 242.
[85] *Recueil de cours*, 1924, t. i, p. 348.
[86] See Wigniolle, *op. cit.*, p. 41.
[87] See Chapter II, sec. 3 "extent of right".

tion" indicates that the treaty continues to exist and has not lost its force. Such an artificial construction of a particular term in the text of Article XIX is not sufficient to differentiate the theory of the doctrine from that of the Article. Certainly it is true that Article XIX does not imply literally that the Assembly will invite a reconsideration of a treaty because it has ceased to be in force. But it is no less certain that the revision of an inapplicable treaty has a meaning only if the treaty has lost its obligatory nature. The whole question is to know whether that eventuality comes from a change of circumstances or not. If the treaty has become inapplicable as the result of a subsequent change of circumstances, then it is logical to conclude that Article XIX actually indorses the doctrine.

Moreover, "caducity" and "revision" are not necessarily two irreconcilable notions. This is conspicuously shown when we examine a clause in the Washington Treaty of Limitation of Armaments of February 6, 1922. In that treaty Article XXI reads: "If during the term of the present Treaty the requirements of the national security of any Contracting Power in respect of naval defense are, in the opinion of that Power, materially affected by any change of circumstances, the Contracting Powers will, at the request of such Power, meet in conference with a view to the reconsideration of the provisions of the Treaty and its amendment by mutual agreement."[88] The phrase "any change of circumstances"

[88] See *Conference on the Limitation of Armament,* (Washington, 1922), p. 1601.

is a very clear reference to the doctrine. A change in conditions might result in a reconsideration of the treaty if the changed circumstances would render the treaty inapplicable or not in accordance with the existing security of one of the contracting parties. In other words, according to the meaning of this article, although a change in conditions may result in rendering the treaty obsolete or no longer in force, yet it is still the responsibility of the contracting parties to effect a common agreement by conference as to its reconsideration or amendment. The existence of these two notions in one clause tends to show that "caducity" and "revision", instead of contradicting each other, are harmonious in spirit. If there were any opposition between the two, the Washington Treaty could not be understood. In the same sense, it is inconsistent or even illogical to maintain that the two ideas could not at the same time be present in Article XIX.

## CHAPTER V

### Jurisprudence of the Doctrine in the World Court and other Judicial Tribunals

#### § 1. *Introduction*

There is an *obiter dictum* by Hall that "there is no place for the refinements of courts in the rough jurisprudence of nations."[1] This is peculiarly true when we attempt to find a jurisprudence of such a politically characterized doctrine as the one under consideration. As investigation shows, there are, however, a number of instructive cases, cognate to the subject, which have been found here and there among the records of the World Court, various Mixed Claims Commissions, and other national or international judicial tribunals. In view of the statement that there have been no cases decided, nor jurisprudence concerning the actual application of the doctrine, the author proposes in the present chapter to present as far as possible the judicial recognition of the doctrine in order to restore it to its proper functioning in the sphere of law. It should be emphasized, however, that, from these few cases, although the doctrine has received judicial recognition and, to some extent, its proper scope of operation has been indicated, it should not be presumed that there has been enough subtleness and refinement in the decisions that have been rendered to

[1] Hall, *International Law*, 8th ed., p. 395, note 2.

make them applicable by international tribunals when dealing with the questions raised by the doctrine. None the less it is hoped that such a presentation of the problem and the conclusions drawn may clarify some points in the legal aspects of our problem.

§ 2. *Cases in the Permanent Court of International Justice*

At present, in view of the uncertainty of the doctrine in theory and practice, it seems more desirable that, in order to vindicate the intrinsic value of the doctrine, its theory should be positively recognized by the jurisprudence of the Permanent Court of International Justice. But up to the present there have been only three cases before the Court raising questions cognate to the doctrine.

First, in the *French Nationality Decrees Case* in 1923, it seemed probable that the doctrine would receive some consideration from an international tribunal. France, in the course of the oral statements before the Permanent Court of International Justice, put forward the doctrine of *rebus sic stantibus* in defense of her case. It was argued that the treaties made by Great Britain with Tunis and Morocco, which were concluded for an indefinite period, "had lapsed by virtue of the principle known as the *clausula rebus sic stantibus*." In particular, she contended that the new legal and juridical régime set up by France in the two protectorates had created a new situation which deprived the capitulation régime of its *raison d'être*.[2] However, as the jurisdiction of the Court in that

[2] *Publications of the Permanent Court of International Justice* (Hereafter cited as P. P. C. I. J.), Ser. B, No. 4, p. 29.

case was to determine whether or not the issue of this dispute was by international law solely a matter of domestic jurisdiction, the Court did not dwell upon the subject but merely stated that "it is clearly not possible to make any pronouncement upon this point without recourse to the principles of international law concerning the duration of the validity of treaties."[3] It is thus quite conceivable that the Court, by implication, recognized the principle of the doctrine as at least a norm in international law.[4]

Secondly, in the case of *the Denunciation of the Sino-Belgian Treaty of November 2, 1865, by China in 1926,* the doctrine *rebus sic stantibus* was again invoked by China before the Court. It was expected, as in the case of *French Nationality Decrees* just mentioned, that the Permanent Court of International Justice would be called on to consider the question at issue, since both parties had at that time accepted the "Optional Clause" annexed to the Statute of the Court. But on account of the repeated refusal on the part of the Chinese government to submit the case to the Court, this expectation was not realized. So far as the matter in connection with the dispute is concerned there were only two orders issued by the Court, and they expressed no position concerning the doctrine.[5]

[3] *Ibid.*, the same page.

[4] Compare A. Wigniolli's *La société des nations et le révision des traités,* wherein he observes that the implied recognition of the doctrine by the Court could be inferred from this advisory opinion. See p. 302 footnote; cf. p. 83.

[5] See P.P.C.I.J., Series A, Nos. 8 and 14. In this case there was much speculation on the question: whether the Court, by virtue of the authority

Thirdly, the latest case before the Court relative to the doctrine was the recent *Free Zones Case* between France and Switzerland. Since it constitutes the most important juridical cognizance ever pronounced upon the doctrine, it is worth while to examine the case *in extenso*.[6]

Before analyzing the case, let us review briefly the facts leading to it. The Free Zones are areas inside the French political frontier adjoining the Canton of Geneva, but, under the Free Zones arrangement, first created in 1815, trade between these zones and Geneva was to be free from French customs duties, so that in effect the French customs frontier did not include these areas of French territory. In the Treaty of Versailles of 1919,

conferred upon it by Article 53 of the Statute, might give a favorable decision to Belgium if China persistently declined to appear before it. Thus Woolsey, in his article in A.J.I.L., 1927, vol. 21 (p. 294), observed that the decision probably would be affected by the composition of the Court. He pointed out that all except two members of the Court who would pass upon this case were nationals of countries which had similar interests in China; in other words, the case would be decided by judges whose Governments would like to see the Belgian Treaty of 1865 continued in force. On the other hand, Mr. Yang Kwang-sheng pointed out: "If the Court would take into consideration the legitimate reasons advanced by China and decide the case in accordance with the spirit of the language in the second part of Article 53 of the Statute, and "if the Court, before doing so, would satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the *claim is well founded in fact and Law"*, it would be doubtful that Belgium would receive a favorable decision. See Yang's article in *Current History,* vol. 25 (Feb., 1927), p. 699.

[6] For a brief account of the case, see B.Y.I.L., 1930, pp. 210-212; and *ibid.,* 1931, pp. 159-163. Or Hudson in A.J.I.L., 1930, vol. 24, pp. 29-34; *ibid.,* 1931, vol. 25, pp. 8-12; *ibid.,* 1932, vol. 26, pp. 801-804; and *ibid.,* 1933, vol. 27, pp. 17-22. For the final settlement and aftermath of this case, see Hudson in *ibid.,* 1934, vol. 28, pp. 322-325. For the orders of the Permanent Court of International Justsice on the case, see P.P.C.I.J., Series A, Nos. 22 and 24. For the final judgment of the Court on the case of June 7, 1932, see *ibid.,* Series A/B, No. 46.

Article 435 contained, *inter alia,* a provision to the effect that the high contracting parties agreed that the stipulations of the treaties of 1815 and other supplementary acts concerning the free zones of Upper Savoy and the Gex district were no longer consistent with present conditions and that it was for France and Switzerland to come to an agreement to settle between themselves the status of these territories.

After some years, during which no agreement was reached between France and Switzerland, France moved her customs frontier and included the zones within it on the following grounds: that she had the right to do so by virtue of Article 435; that Switzerland had never acquired any right to the maintenance of these zones since the latter was not a party to any of the treaties under which they had been created, and that the other parties to those treaties had, by Article 435, released France from her obligation to maintain them. On the contrary, Switzerland maintained that, since she was not a party to the Treaty of Versailles, her acquiescence in Article 435 was only conditioned upon the two reservations contained in a note annexed to the Article exchanged between France and Switzerland. One of these conditions was that she did not agree to the suppression of these zones or to anything more than some changes in the manner in which the customs system of the zones was regulated. The other was that the stipulations of the treaties of 1815 should remain in force until a new arrangement was reached between France and Switzerland with regard to these zones.

Subsequently, by a *compromis* concluded between France and Switzerland on October 30, 1924, and ratified on March 21, 1928,[7] the dispute was submitted to the Court. In brief, the fundamental question at issue between the parties was whether, as a result of Article 435, paragraph 2, of the Treaty of Versailles, with its annexes, the special customs régime established in the free zones under a series of anterior treaties could be abolished without the consent of Switzerland.

In the main, France contended before the Court on the ground of the doctrine of *rebus sic stantibus,* with special reference to the validity of the old agreements, that those agreements, like all others, were based upon the conditions existing at the time when they were made and that a vital change in such conditions rendered the engagements no longer applicable. The change in the circumstances invoked by France in the present case was that, whereas, at the time these obligations were contracted, the Canton of Geneva had its own customs system separate from the rest of Switzerland, under the later constitutional change in the Confederation, one system of customs became applicable to the whole of Switzerland. Consequently the arrangements were entirely different with regard to the zones, because such agreements with regard to the zones were open, as originally intended, to the trade of the whole of Switzerland but not merely to that of the Canton of Geneva.

[7] For the full text of the *Compromis* see P. P. C. I. J., Series C, No. 17 (1), p. 490.

In the decision, with special reference to the French contention based on the doctrine, the Court rejected the argument merely on the existence of the fact that such a change in circumstances justifying the abrogation had already been met by the new agreement reached by the two parties as embodied in Article 435, paragraph 1, of the Treaty of Versailles, by which the abolition of the free zone of Upper Savoy was mutually agreed upon on the ground that the "stipulations are no longer consistent with the present conditions."[8]

In particular, as to the question submitted by the parties whether the provisions of 1815 were abrogated by Article 435, the Court held by a majority that the expression "are no longer consistent with present conditions" in both paragraphs of the said Article should not be regarded "as *ipso facto* involving" the abolition of the free zones.[9] In other words, the Court held that Article

[8] P. P. C. I. J., Series A, No. 22, p. 17.

[9] *Ibid.* According to the dissenting opinion of Judge Nyholm, the provisions of 1815 were abrogated from a textual interpretation of Article 435. For he thought that the intention of the author of Article 435 was shown by the fact that "the former situation — withdrawal of the customs line — was *replaced* by a quite different situation"; namely, that the relations between France and Switzerland in the districts in question have become free and are made subject to an agreement to be entered into by the two parties. Thus viewed, he observed that "the former state of things and the new freedom *cannot exist at the same time;* they are not two *mutually supporting* rules; on the contrary, the one excludes the other." See *ibid., p.* 24. In the dissenting opinion of M. Pessôa the position was taken that the object of paragraph 2 of Article 435 was the abrogation of the old provisions of the Treaty of 1815. Thus viewed, he said that the future agreement contemplated by paragraph 2 of the said article "will thus relate not to the *actual fact of replacement,* but solely to the *form and conditions* of replacement." In other words, to him the abrogation of the old stipulations of the Treaty of 1815 relating to the zones was

435, paragraph 2, of the said Treaty had not abrogated the provisions of the Treaty of 1815 and other supplementary instruments. This position was reaffirmed by the Court in its second order issued on December 6, 1930, in which the Court explicitly defined the term "present conditions" as:

> The conditions which exist, or will exist at the time of the negotiations to be undertaken between the Parties, with the exception that changes which may have occurred since November 1923 and which may be the consequence of the transfer of the French customs barrier to the political frontier, cannot be adduced.[10]

In other words, the Court again considered unlawful the single-handed action of France adopted in 1923.[11]

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a fact accomplished by paragraph 2 of Article 435. *Ibid.*, p. 50. However, M. Dreyfus, French National judge *ad hoc*, would seem to have held the view that the declaration inscribed in paragraph 2 of Article 435 did not *ipso jure* abrogate the free zones, but it merely meant that abrogation in the future by the common consent of the parties concerned appeared necessary. *Ibid.*, p. 47. It should be observed here, however, that the reason why he took such a moderate view was, as he conceived it, that to admit such an abrogation would run "counter to a right which might be put forward as against France." See *ibid.*, the same page.

[10] See P. P. C. I. J., Series A, No. 24, p. 16.

[11] As to the question of unilateral denunciation as raised by France, Deputy Judge Negulesco, in his dissenting opinion, dealt with this contention from the point of view of general international law, and held that the principle of *rebus sic stantibus* may be invoked as a ground for the extinction of treaty obligations, but he qualified the statement by saying that, even in cases where the application of the principle is established, there is still no unilateral right to denounce the obligation, but only to have it cancelled under the procedure provided in Article XIX of the Covenant of the League of Nations or by common agreement. See P. P. C. I. J., Series A, No. 22, pp. 30, 36. On the other hand, M. Dreyfus, French national judge *ad hoc*, would seem to have been of the opinion that, in cases where the principle applied, a party might have the right to denounce the obligation unilaterally. *Ibid.*, pp. 41-42, 26.

Subsequently, the hearings in the case, which had been brought before the Court by the French and Swiss Governments and which had already formed the subject of two orders, again were opened on April 19, 1932.[12] On June 7, 1932, the Court delivered its final judgment in the case to the effect that these free zones — which, after being created in 1815 and 1816, had been abolished in 1923 by the single-handed action of France — are to be maintained in existence. Accordingly, the Court rules that France must withdraw her customs line in conformity with the provisions of 1815-1816. This withdrawal has to be effected by January 1, 1934. However the Court added that the withdrawal of the customs line did not affect the right of the French Government to collect at the political frontier fiscal duties not possessing the character of customs duties.[13]

In the main the judgments rendered in the case can not be interpreted as constituting a case for the rejection of the validity of the *rebus sic stantibus* doctrine. For, on the one hand, it is quite evident, as the Court pointed out, that, in the present case, paragraph 1 of Article 435, though literally relating to the abrogation of the old stipulations, should be read in connection with paragraph 2 of the Article, in which the old system is explicitly spoken of as "no longer consistent with the present conditions" and in paragraph 2 it is intended that France and

[12] See *Monthly Summary of the League of Nations, April* 1932, Vol. XII, p. 141.

[13] *Ibid.*, June 1932, Vol. XII, p. 202. See P. P. C. I. J., Series A/B, No. 46, esp. pp. 149, 171-172. The decision was rendered by six votes to five.

Switzerland should come to an agreement to settle between themselves the status of these territories under such conditions as shall be deemed suitable by both parties. Moreover, on the other hand, the Court rejected the French argument which was based on the doctrine, because France failed to present the necessary facts. Hence the Court refused to consider "any of the questions of principle which arise in connection with the theory of the lapse of treaties by reason of change of circumstances, such as the extent to which the theory can be regarded as constituting a rule of international law, the occasions on which and the method by which effect can be given to the theory if recognized, and the question whether it would apply to treaties establishing rights such as that which Switzerland derived from the treaties of 1815 and 1816."[14]

Apart from the three above-mentioned cases, in which the doctrine of *rebus sic stantibus* was expressly invoked by one party to effect treaty termination, there is another case found in the records of the World Court which may be said to be relative to the invocation of the doctrine, although it has not received the cognizance of authors who have had occasion to discuss the doctrine in operation. For this reason, and for the sake of coherence, attention may here be called to it.

*Protection of German Settlers in Poland, decided on September 10,1923.*[15] Briefly speaking, this case involved

[14] See P. P. C. I. J., Series A/B, No. 46, p. 158.

[15] For a brief account of the case see A. J. I. L., 1924, vol. 18, pp. 13-17; and *ibid.*, vol. 19, pp. 70-71. For a summary of the decision see B. Y. I. L., 1924, pp. 207-208. For text of opinion, see P. P. C. I. J., Series B, No. 6; for Acts and Documents relating thereto, see *ibid.*, Series C, No. 3, 3rd Session, Vol. III, Parts I and II.

the question, how far the acquired private rights under existing treaties can be affected by a change of sovereignty. The question at issue concerned the legality of certain legislative and administrative acts enacted by the Polish Government against a number of colonists who were formerly German nationals but were later placed under the sovereignty of Poland when the territories in which they were domiciled were ceded to Poland by Germany through the operation of the Treaty of Versailles.

By these acts the Polish Government sought to exercise a proprietary right conferred upon her under Article 256 of the Treaty; namely, the right to resume possession of farms held under a "Rentengutsvertrag" at any time until the final act of conveyance had been performed.[16] As a consequence, two classes of colonists were ousted by these measures: those holding under contracts entitling the colonists to receive title to the land, where the definitive conveyance had not been completed until after the Armistice of November 11, 1918; and those holding under leases for which such contracts had been substituted after the date of the Armistice.

The German settlers brought this matter to the attention of the League as early as November, 1921. However, as a consequence of the failure of the Council to effect a settlement, the case was referred to the World Court by a resolution of the Council on February 3,

[16] See P. P. C. I. J., Series C, No. 3, Vol. III, p. 251.

1923.[17] In the resolution two questions were submitted to the Court. The first question was as to whether Poland's refusal to recognize contracts and leases made by certain German colonists with the German Colonization Commission before the end of the War involved an international obligation within the competence of the League of Nations under the Polish Minorities Treaty of June 28, 1919.[18] Secondly, if so, whether Poland's position with respect to these contracts and leases was in conformity with her international obligations.

The Polish Government advanced several reasons based to some extent on the ground of the doctrine of *rebus sic stantibus* in justifying her action not to renew the farming contracts. First, she alleged that the farming contracts entered into by the former Colonization Commission had finally ceased to exist by reason of their subsequent change into sale contracts. Secondly, she asserted that according to the farming contracts the transfer or the holding of the farms on leases depended on a series of

[17] See *Official Journal,* March 1923, pp. 240, 395. Previously the Council had discussed the problem at considerable length. See *Minutes of the Council,* 10th Session, p. 33; *ibid.,* 13th sesion, pp. 51, 235. Cf. *ibid.,* June 1922, pp. 555, 702; August 1922, pp. 806, 917; and November 1922, pp. 1181, 1293. Moreover, a Committee of Jurists had been appointed by the Council for the purpose of finding a basis of agreement between the parties. This committee made a report upon the legal character of the question concerning the contracts of German settlers and the interpretation of Article 4 of the Polish Minorities Treaty of June 28, 1919. See *ibid.,* November 1922, p. 1299.

[18] See *Protection of Linguistic, Racial and Religious Minorities by the League of Nations* (C. I. 110, 1927, I Annex, 1927, I. R. 2), p. 42. By the Treaty were assured to the Minorities in Poland the same civil and political rights and the same treatment and security in law and fact as to other Polish Nationals.

conditions which had to be fulfilled by the tenants: for instance, the payment of deposit, etc. These conditions, she contended, were to guarantee the rights of the government and had become obsolete when the farms were subsequently transformed into property held under the system of payment of yearly installments. Finally, she maintained that it would be impossible "to renew the contracts concluded under special economic and political conditions and for special aims, since these conditions had been fundamentally changed and that these aims and objects had ceased to exist."[19]

In its advisory opinion, the Court had first to consider a contention by Poland that the League was not competent to deal with the question at issue. To this, the Court unanimously agreed that, in view of the existence of a specific stipulation to the contrary in the Minorities Treaty,[20] the Council was competent to do so. As to the second question, the Court held that the Armistice of November 11, 1918, had not invalidated the contracts under consideration, for the cession of German territories to Poland had not been effective until January 10, 1920, when the Treaty of Versailles came into force. In other words, the Court considered that the date of entry into force of the Peace Treaty, not that of Armistice, was the date at which sovereignty over the territories at issue legally passed to Poland. Thus interpreted, the Court held that the transactions effected in the interval by Prussia were valid. The Court said that such valid

19 P. P. C. I. J., Series C, No. 3, Vol. III, p. 264 *et seq.*
20 See paragraph 2 of Article XII of the Polish Minorities Treaty.

private rights acquired by contracts or by leases under the existing law "do not cease on a change of sovereignty," and that Poland was bound to respect such dealings when she took over the governance of the territories in question.[21] The same reasoning led the Court to uphold the validity of those leases known as *Pacht-Verträge* concluded prior to November 11, 1918. All in all, in regard to the second question referred to it by the Council, the Court advised that the position adopted by the Polish Government was not in conformity with its international obligations.

At length, through the conciliation of the Council, Poland agreed to compensate the colonists already illegally ousted and to suspend further proceedings against other colonists. The question was considered as definitely settled on June 17, 1924.[22]

As to the merit of the opinion, there is no room to doubt its juridical value. For the principle of state succession that finds most favor with modern international jurists[23] is that a change of sovereignty through territorial

21 See P. P. C. J., Series B, No. 6, 36.

22 See *League of Nations Official Journal,* July 1924, p. 926.

23 See Moore, *Digest,* part I, p. 385 *et seq.;* Halleck, *International Law,* 4th ed., 1908, Vol. II, p. 518; Lawrence, *Principles of International Law,* 6th ed., 1915, pp. 96, 331; Phillipson, *Termination of War and Treaties of Peace,* 1916, pp. 320, 331; Oppenheim, *International Law,* 3rd ed., 1920, p. 144 *et seq.;* F. Smith, *International Law,* 5th ed., 1918, p. 289; and Lauterpacht, *Analogies,* 1927, p. 132. Reference may be also made to A. B. Keith, *The Theory of State Succession,* 1907, p. 50 *et seq.;* H. Bonfils, *Manual de droit international public,* 7th ed., 1914, pp. 145-146; A. Cosson, *Les cessions de territories,* 1910, p. 195; Gilbert Gidel, *Des effets de l'annexion sur les concessions,* 1904; and Franz von Liszt, *Das Völkerrecht,* t. VI (1910), p. 172 *et seq.*

cession cannot affect private rights already vested in individuals or corporations. In truth, as has been pointed out by the Court, "even those who contest the existence in international law of a general principle of state succession do not go so far as to maintain that private rights, including those acquired from the state as the owner of the property, are invalid as against a successor in sovereignty."[24] Moreover, in the present case the acquired rights of the colonists were guaranteed under specific provisions of law and of treaty.[25] Therefore no reason could be advanced under the doctrine for modification and cancellation without compensation by the Polish government of these specifically guaranteed rights of the colonists.

## § 3. *Cases in other Judicial Tribunals*

1. *Impossibility of Performance.* In the *Martini Case* before the Italian-Venezuelan Arbitration Commission, the claimants, Lanzoni, Martini and Co., of Italy,

[24] See P. P. C. I. J., Series B, No. 6, p. 36. Chief Justice Marshall in the case of the *United States v. Perchman* (7 Peter's Reports at page 51) stated the same principle as follows: "No modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their ancient sovereign is dissolved; but their relations to each other and their rights of property remain undisturbed."

[25] In Article 12 of the Minorities Treaty it is stipulated that the engagements entered into by Poland should not be modified otherwise than with the previous consent of the majority of the members of the League of Nations. This principle is found in the Constitution of Poland of March 17 of 1921. See Arts. 109 and 110 in M. H. Andrews' *Twelve Leading Constitutions* (1931), pp. 316-317.

pleaded that the contract made with the Venezuelan Government was based upon the tacit condition that the port of Guanta should be maintained by Venezuela as a port of entry.[26] Besides, they contended that the company, when it made the contract with the Venezuelan Government, did not have the idea that the government would subsequently destroy the usefulness of the port as to ingress and egress.[27]

But the umpire in the case declined to allow for an "unfortunate consequence of war for which the company can claim no personal idemnity," and, consequently, refused to grant damages for "lack of pacific enjoyment of the thing rented" due to injury from trespassing resultant upon a state of war.[28]

In short, the umpire in the course of his judgment impliedly upheld the principle that impossibility of performance of a contract caused by one of the parties might furnish a basis of liability; but, in the present case, the Venezuelan Government could not be held responsible because the damages resulted from the unexpected occurrence of war. In other words, the Court made clear the juridical distinction: Impossibility of performance as

[26] See *Venezuelan Arbitration of 1903* (Ralston's report), p. 843. Under the contract the claimants had the right to possess the wharf of Guanta and to charge and receive port duties.

[27] *Ibid.*, the same page.

[28] *Ibid.*, p. 846. But the Commission, interpreting the contract in light of the surrounding circumstances, held the Venezuelan government responsible for damage incidental to its subsequent closure by executive order, because at the time the contract was signed the port of Guanta was open to foreign commerce. This condition, the Commission held, constituted a material element in the value of the contract. *Ibid.*, p. 845.

a result of the fault of one of the parties should furnish a ground of liability; but impossibility of performance caused by no fault of either party should not give rise to responsibility.[29] Inversely, in view of this judicial pronouncement, it is reasonable to conceive that neither party to a contract in case of a breach, is responsible for speculative profits but only for those profits which were contemplated at the time the contract was concluded. In an opinion of the Supreme Court of the United States,[30] the same principle was laid down in the following words:

> It is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness; or where, from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into.

In the *Russian Indemnity* Cases before the Hague Arbitration Court, 1910,[31] Russia claimed interest for the delayed payments of certain indemnity sums provided for by Article 5 of the Treaty of Constantinople, concluded in 1879 after the war of 1877-1878 with Turkey. The claims amounted in all to 6,186,543 francs, of which sum 50,000 Turkish pounds were paid in 1884, 50,000 in

[29] For other cases arising from accidents of war, see Ralston, *The Law and Procedure of International Tribunals* (1926), section 715.

[30] *Howard v. Stillwell, etc., Manufacturing Co.*, 139 U. S. 199.

[31] See Scott, *Hague Court Reports*, p. 297 *et seq.*

1899, 75,000 in 1893, 50,000 in 1894 and a trifle over 42,438 in 1902, leaving a balance of 1,539 Turkish pounds, which the Turkish government deposited in the Ottoman Bank to the credit of Russia, but which the latter refused to receive on the ground that payment of the interest which Russia claimed for the delayed payments had not been made. The controversy over this interest was submitted to the Hague Arbitration Court by a *Compromis* signed at Constantinople July 22 to August 4, 1910.

Turkey contended that the position of a state is not that of an ordinary debtor under private law and that it is limited by the assets under its disposal. She argued that just as it is the first duty of a private person to pay his debts, so it is the first duty of a state to defray the expenses of administration and defense. Further, she pointed out that to compel a state to pay moratory interest and thus become a debtor to a greater extent than it would have wished is to expose it to the risk of compromising its finances and even its political existence.[32] In the main, she pleaded as of first importance the operation of *force majeure*.[33] She contended that, during 1881-1902, she was in the midst of financial difficulties of the utmost seriousness as a result of domestic insurrections and foreign war. Consequently, she was placed in a position where she could meet her engagements only

[32] Turkey's *Counter-case*, p. 33, No. 91. See Scott, *op. cit.*, pp. 310, 311.

[33] *Turkey's Counter-reply*, p. 43, Nos. 119 to 128, p. 64, Nos. 382 to 398 and p. 87. See Scott, *op. cit.*, pp. 311, 315.

with delay and postponements, and even then at a great sacrifice.

The Court, in principle, admitted that the obligations of a state to fulfil treaties may give way "if the very existence of the state should be in danger, if the observance of international duty is self-destructive."[34] However, the tribunal was of the opinion that in the present case Turkey could not demand an exception to the rule of the responsibility of states, because she had explicitly accepted it.[35] Moreover the tribunal pointed out that the comparatively small amount of payments of interest (about six million francs) would not amount to enough to imperil the existence of the Ottoman Empire.[36] On the other hand, the tribunal held that the Ottoman Government was not liable to pay interest-damages as demanded by Russia on the ground that in the present case Russia had in effect renounced her claim for interest by repeatedly accepting installments of the principal in which no interest was included and without making any reserve as to the non-inclusion of interest.[37]

2. *Frustration of the Object or Non-performance of a Condition in the Treaty.* In the *Tacna-Arica Arbitration between Chile and Peru* decided by the President of the United States on March 4, 1925,[38] we find a specific

[34] Scott, *op. cit.*, p. 318.
[35] *Ibid.*, p. 315.
[36] *Ibid.*, p. 318.
[37] *Ibid.*, p. 298.
[38] For the award, see A. J. I. L., 1925, Vol. XIX, pp. 393-432; cf. *ibid.*, 1926, Vol. XX, pp. 605-625 for the findings of the Plebiscitary Commission terminating the Plebiscitary Proceedings in Tacna-Arica owing to its

case involving the question of unilateral discharge of a treaty resulting from non-performance or non-fulfillment of a condition in the treaty by the other party. Article 3 of the Treaty of Ancon of 1883, concluded at the end of a war between the two countries, provided that the occupied territory of Tacna-Arica "shall continue in the possession of Chile subject to Chilean laws and authority during a period of ten years and that after the expiration of that term, a plebiscite will decide by popular vote whether the territory of the above-mentioned provinces is to remain or is to continue to constitute a part of Peru." Since before and after 1893 the negotiations between the parties failed to produce an agreement putting into effect the provisions of the treaty relating to the holding of the plebiscite, and after an unsuccessful attempt on the part of Peru to refer the question to the League of Nations under Article XIX of the Covenant,[39] the parties agreed to submit the dispute to an arbitral decision by the President of the United States. The main task of the arbitrator was to decide whether a plebiscite should or should not be held to determine the sovereignty of the territory in question, and, in case of an affirmative answer to this question, to determine the conditions under which the plebiscite should be held.

It was contended by Peru before the arbitrator that as Chile, acting in bad faith, had frustrated the conclusion

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frustration by Chile. For a short account of the case see B. Y. I. L., 1930, pp. 187-193; or Wright, in *Revue de droit international et de législation comparée,* 3rd series, 1925, Vol. VI, pp. 295-302.

[39] See above, p. 106.

of the agreement providing for the holding of a plebiscite, no plebiscite could legally be held and thus the immediate restoration of Tacna-Arica to her without a plebiscite should be granted. She maintained that with regard to Chile the plebiscite and its success-outcome in her favor was a condition precedent to the inception of Chilean sovereignty in Tacna-Africa. The failure of Chile to hold the plebiscite, and the fact that Chile had intentionally prevented the performance of the only condition upon which her sovereignty could rest, justified Peru in regarding the legal relations with Chile created by the Treaty of Ancon as terminated.[40] In the main, Peru based her argument on a universal principle of the municipal law of contracts that a condition is to be regarded as fulfilled or performed whenever its realization has been wilfully prevented by the party interested in its non-fulfillment or non-performance.[41] Briefly speaking, on the other hand, Chile contended that the condition imposed by the Treaty of Ancon was a resolutory one and that she in no way accepted the blame for the frustration of its fulfillment.[42]

In the decision rendered on March 4, 1925, the arbitrator did not reject Peru's argument as one based upon an inadmissable analogy from private law. Neither did

[40] See *Case of Peru*, pp. 231, 250-252.

[41] To this contention, Peru quoted Roman Law, a large number of modern codes, leading English and American cases, as well as a great majority of publicists. See *ibid.*, pp. 232-239.

[42] See *Counter Case of Chile*, pp. 100-105, where the similar case of Article 34 of the Treaty of Versailles concerning the conditional cession of Eupen and Malmédy to Belgium is discussed.

he hesitate to declare that, in case he had found in the action of Chile an intent to frustrate the plebiscite, or bad faith, he would have stated it expressly and held "the party guilty thereof to the consequences of its action."[43] However, in view of the danger of involving national honor should he lightly impute such an intent or bad faith, although then circumstantial evidence was admissable to render such a decision, he found no reason why a plebiscite should not be held and therefore gave an affirmative answer to the question.

As an outcome, a plebiscitary commission was set up for the purpose of supervising the actual holding of the plebiscite. Later, the commission found out that, in view of the attitude of the Chilean administration in the provinces, the holding of a free and fair plebiscite as required by the Award of March 4, 1925 was "impracticable of accomplishment." Thus, the plebiscitary proceedings were declared terminated.[44] This deadlock lasted until finally, through the repeated good offices offered by the United States, a definite agreement between the two parties was concluded on June 3, 1929, by which the dispute arising out of Article 3 of the Treaty of 1883 was declared to be definitely at an end and Tacna was formally returned to Peru on August 28, 1929.[45]

Upon the whole, the protracted controversy, after the vicissitudes of forty-five years of diplomacy ended, as

[43] Award, *loc. cit.*, p. 399.

[44] See A.J.I.L., 1926, Vol. XX, pp. 624, 625.

[45] See Articles 1 and 2. For the text, see *Treaty Series,* No. 2157, vol. 94, p. 402. By Article 2 of the agreement the territory of Tacna and Arica was divided into two parts, Peru taking Tacna and Chile taking Arica.

in so many cases, in a compromise. As to the merits of the decision of the arbitrator, the writer refrains from a judgment. However, in view of the failure of the arbitrator to recognize the Peruvian argument which dealt with the specific performance character of the plebiscite and his insistence on the literal interpretation of the provision that the plebiscite should be held *after* the expiration of ten years, it is likely that his decision was defective, both juridically and practically.[46] In fact, his decision was shackled by the view, as we have seen, that the *onus probandi* in such cases "should not be lighter where the honor of a nation is involved than in a case where the reputation of a private individual is concerned."[47] On the other hand, judging from the terms of the agreement of final settlement that, whereas Chile pays to Peru the sum of six million dollars in respect of the acquisition of Arica, Peru pays nothing to Chile in respect of the retention of Tacna,[48] it would seem that Chile has, by implication, admitted that both provinces were, up to the date of settlement, under the legal sovereignty of Peru, although in the possession and under the *de facto* rule of Chile.

3. *Other Miscellaneous Cases Illustrating the Operation of* the *Doctrine.* In the decision of the Supreme Court of Switzerland upon a treaty in a dispute between the cantons of *Lucerne and Aargau* in 1882,[49] the court

[46] See Lauterpacht, *Analogies,* p. 293, note 2.

[47] See Award, *loc. cit.,* p. 399.

[48] See Article 6.

[49] See *Entscheidung des Schweizer Bundesgerichts,* 1882, Vol. VIII, p. 57. Cited in Kaufman, *Wesen des Völkerrechts und die Clausula Rebus Sie Stantibus,* p. 38; and Lauterpacht, *op. cit.,* p. 169 note 2. In this case

recognized the validity of the doctrine of *rebus sic stantibus* as a ground for denunciation of treaty obligations on account of certain changed conditions. The court declared:

> There is no doubt that treaties may be denounced unilaterally by a party under obligation, if their continuance is incompatible with its vital interests as an independent commonwealth or with its fundamental purposes, or if there has taken place such a change of circumstances as, according to the apparent intention of the parties, constituted, at the time of its creation, an implied condition of its continued existence.

However, after this declaration, the Court came to the conclusion that "apparently, there exists no such an abrogation in the present case", and, therefore, that Lucerne could not be conceded the unilateral right of denunciation.[50]

In the case of *Hooper v. United States,* decided in 1887,[51] the U. S. Court of Claims held that a treaty which contains no clause providing for its termination may be annulled by one of the parties under certain circumstances. In connection with the denunciation of a treaty on account of changed circumstances, the Court went on to cite the view of Wharton that abrogation of treaties may occur through change of circumstances and that the doctrine *rebus sic stantibus* "is held to apply to all cases in

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Lucerne demanded to be released from an international servitude created by a treaty with Aargau.

[50] Kaufman observed that "In spite of the denial of the *Clausula* by the Court in this particular instance, the *clausula* was recognized here as a juristic principle according to which the validity of treaties between States should be decided." See Kaufman, *op. cit.*

[51] 22 Court of Claims 408; Scott, *Cases on International Law*, p. 470.

which the reason for a treaty has failed, for there has been such a change of circumstances as to make its performance impracticable except at an unreasonable sacrifice."[52]

In the case of *Lepeschkin v. Gosmeiler and Company* decided in 1923 by the Federal Tribunal of Switzerland,[53] the Court affirmed the general principle of international law that modification of the form of a government and of the internal organization of a state has no effect on its rights and obligations under the general public law and those derived from treaties concluded with other states. The Court, however, specifically recognized in this particular case that a profound alteration in the internal organization of a state might result in the disappearance of conditions in view of which a treaty was concluded, and thus the other contracting party might acquire a right to withdraw from the agreement by virtue of the principle of public law known under the name of *clausula rebus sic stantibus*.[54]

[52] However, the decision of the Court was not based merely on the ground of the change of circumstances, but also on the ground of repeated violation of the treaties of 1778 by France. Scott, *Cases,* p. 472.

[53] See 71 *Journal des tribunaux et revue judiciaire,* p. 582; Hudson, *Cases on International Law,* pp. 100-102.

[54] This principle was positively recognized by the Sixth International American Conference held at Habana, 1928. Thus Article XI of the Convention on Treaties reads: "Treaties shall continue in effect even though the internal constitution of the contracting states has been modified. If the organization of the state should be changed in such a manner as to render impossible the execution of treaties, because of division of territory or other like reasons, treaties shall be adapted to the new conditions." See A. J. I. L., Supplement of 1928, vol. 22, p. 139.

*Bremen (Free Hanse City of) v. Prussia, decided by German Staatsgerichtshof, June 29, 1925.*[55] A treaty entered into on May 21, 1904, between Bremen and Prussia provided for an exchange of portions of territory belonging to each of the two states mainly with the view of enabling Bremen to extend the facilities for transport by sea. Article 13 of the Treaty stipulated that a specified portion of the territory received by Bremen in exchange should be used by Bremen only for the purpose of constructing ports and other works connected with navigation; and Article 22 provided that no works connected with the fishing industry should be constructed or allowed by Bremen. Before the Staatsgerichtshof Bremen asked for a recission of the restrictive clauses, subject, if necessary, to adequate compensation to be paid by her. She claimed that, as a result of the outcome of the War of 1914-1918, there had taken place a total change in the circumstances which underlay the conclusion of the Treaty. It was expected in 1904 that not only would the commercial fleet of Bremen, especially the North German Lloyd, continue to exist, but also that a rapid development of that fleet would take place. It was in view of this expectation that Bremen agreed to the restrictions contemplated in Articles 13 and 22. Besides, as Bremen pointed out before the court, the Treaty of Versailles effected a complete change in the situation in that the

[55] See McNair and Lauterpacht's *Annual Digest,* 1925-1926, pp. 352-354. Reported in *Entscheidungen des Reichsgerichts im zivilsachen,* vol. 112, Appendix, p. 21; and *Zeitschrift für internationales Recht,* 1926, Vol. XXXVI, p. 426.

German commercial fleet was handed over to the Allied Powers, that the position of Bremen as a center of shipping and navigation was irretrievably lost; and that the operation of the restrictive clauses had become most oppressive as the prohibited activities had now become the only sphere open to Bremen as a maritime state.

In the decision the Court refused the application of Bremen, though it specificially admitted that "International law recognizes to a large extent the possibility of termination of treaties on account of changed circumstances in accordance with the principle *rebus sic stantibus.*" The refusal was based on the ground that the two restrictive clauses, of which Bremen specifically asked for a rescission, constituted the principal conditions upon which Prussia agreed to the treaty. In other words, in the opinion of the Court, these clauses were intended to achieve the principal object of the treaty when the treaty was contemplated. Thus viewed, the Court was correct in pronouncing the adverse decision as to the claim based on the doctrine. In fact, as the Court explicitly pointed out, the above decision did not amount to a rejection of the doctrine *rebus sic stantibus.* The doctrine, as the Court held, "could still be applied in regard to certain payments or time limits contemplated in several provisions of the treaty."

*Rothschild & Sons v. Egyptian Government, decided by Mixed Courts of Egypt, 1925-1926.*[56] The facts in this

[56] See *ibid.*, pp. 20-21. Reported in *Gazette des tribunaux mixtes,* August, 1925; and *Journal des tribunaus mixtes,* May 6, 1926. See also *Journal du droit international* 52 (1925), p. 1091; and 53 (1926), p. 754.

case may be stated in condensed form as follows: The Egyptian Government, then under the suzerainty of the Turkish Empire, was obliged to pay annually to Messrs. Rothschild in London, as a guarantee for the Ottoman loans of 1891 and 1894, certain fixed and specific sums until the loans should be completely discharged. The amounts due were paid regularly by Egypt until July, 1924, when the Egyptian Government refused to continue to pay, on the ground that the abolition of Turkish suzerainty had released Egypt from the payment of tribute to Turkey and therefore also from the obligation to pay to Messrs. Rothschild the sum which was a portion of the tribute. An action was entered before the Mixed Court by the holders of certain of the bonds of 1891 and 1894, and by Messrs. Rothschild, claiming against the Egyptian Government payment of the amount due. On the grounds set forth above the Egyptian Government demurred to the jurisdiction of the Mixed Court and to the claim of the bond-holders, with whom it had entered into no agreement.

In the decision of the Mixed Court of First Instance, rendered on June 15, 1925, it was held that the sum assumed by the Egyptian Government should be paid to the company notwithstanding the fact that the sums payable to the bond-holders were to be raised from the Egyptian tribute which had ceased to be due. With special reference to the application of the doctrine, the Court declared that it "applies only to contracts and obligations of an indefinite duration, and not to those

which have a specific fixed and limited duration." This decision was confirmed by the Mixed Court of Appeal on March 29, 1926.

In view of the limited status of sovereignty in Egypt on account of the system of Capitulations, it is likely that the Mixed Courts had to consider the Egyptian government as an ordinary institution which could incur a civil obligation and be subject to ordinary jurisdiction with respect to any matters arising out of the obligation. In other words, the Courts recognized the fact that the then existing Egyptian Government, being a limited sovereign, could not rely on its sovereign authority to release itself from the obligation. Moreover, as the Court of Appeal admitted, the Mixed Courts, being specially constituted, were not competent to examine the question of public law as to the circumstances in which the Egyptian tribute ceased to be due to the Ottoman Government in consequence of the abolition of Turkish suzerainty. It is conceivable that it was for these two reasons that the Courts refused to consider the contention of the Egyptian Government based on the doctrine of *rebus sic stantibus*.

*The Land Tax Immunities Case, held by German Reichsfinanczof (Federal Tribunal in Revenue Matters) on March 9, 1927.*[57] The appellant maintained that his property could not be subjected to a land tax in accordance with the German Property Tax Law of 1922, be-

[57] McNair and Lauterpacht's *Annual Digest*, 1927-1928, Case No. 56, pp. 84-85. Reported in *Steuer und Wirtschaft*, 1927, VI, p. 170.

cause, in the Treaties of Vienna and of Prague, Prussia undertook to exempt the properties in question from land taxation. The particular question in this case was the extent to which the obligations assumed by Prussia in the treaties should be passed on to the German Reich.

In its decision the Court rejected the appeal on the ground that in view of the existing rules of international law there was no absolute duty imposed upon Germany to take over the obligations incurred by Prussia. [58] In other words, the Court recognized the fact, as it observed in the course of its judgment, that an international treaty may be rendered obsolete as a result of changed circumstances and "thus abolished without any express rescission." Apparently, as the case shows, the change of circumstances affecting the treaties was the absorbtion of Prussia into the German Reich.

*Canton of Thurgau v. Canton of St. Gallen, held by Swiss Federal Court, February 10, 1928.*[59] This case involved the *clausula rebus sic stantibus* as applied to state

[58] As the Court pointed out in its judgment, there were three opinions as to the duty of Germany to take over the obligations of Prussia: one view was that the treaties concluded by Prussia before the establishment of the North German Confederation were automatically binding upon the Reich. Another view denied that any such obligations devolved *ipso jure* upon Germany. The intermediate view was that those obligations passed to the Reich if they related to matters in regard to which the Reich alone was competent, or if, having regard to the purpose of the treaty, the passing of the obligation on the Reich ought to be assumed.

[59] See McNair and Lauterpacht's *Annual Digest*, 1927-1928, pp. 420-421. Reported in *Entscheidungen des Schweizerischen Bundesgerichts*, vol. 54, I, 188. It is worthwhile to observe here that McNair has properly classified the *Clausula rebus sic stantibus* as one of the ways by which the termination of treaties has been affected by the operation of law.

servitude between Swiss Cantons. Since the Swiss Federal Court at the present time exercises the function of supreme judge between the members of the Swiss Federal State, it is proper to expect that this Court would give an important judicial pronouncement on the application of the doctrine of *rebus sic stantibus* to relations between states. It is proper, therefore, to consider the case at some length.

In the border district between the Cantons of Thurgau and St. Gallen, the Catholic parishes of Thurgau have, ever since 1669, included a village lying within the territory of St. Gallen, namely, within the political district of Kirchberg. On October 8, 1868, after several disputes about the payment of dues, the Cantonal Governments of Thurgau and St. Gallen agreed that all Catholics living within these parts of St. Gallen should be treated as belonging to the parish of Rickenbach in Thurgau and should pay school and church rates according to the tax laws of that Canton. Disputes arose over the treatment of new households in these territories, and a new agreement was reached on March 27, 1883. It was agreed that the members of new households would have to buy their place in the church and school system of Thurgau along with their purchase of the homestead. This provision provoked the opposition of the ecclesiastical authorities of St. Gallen, and on December 14, 1891 two new agreements were reached, covering church and school questions respectively, to settle the rating and frontier difficulties in the parish of Rickenbach in Thurgau. The school agreement was for two years, after that period

either side was to be free to denounce it upon due notice. The church agreement contained neither a time limit nor a renunciation clause. In the year 1923 the authorities of St. Gallen informed those of Thurgau that the occupant of the Lampertswil homestead was seeking membership in the ecclesiastical community of Kirchberg, and that his request had been acceded to. The authorities of Thurgau refused to permit such an alteration of terms of the agreement, and, in consequence, in 1925 St. Gallen denounced the church agreement. Thurgau denied the validity of this denunciation, and maintained that there were no reasons which could justify the action of St. Gallen on the ground of the *clausula rebus sic stantibus*. St. Gallen, meanwhile, informed Thurgau that as from July 1, 1926 they would treat the agreement, so far as it affected Lampertswil, as non-existent.

The Canton of Thurgau, therefore, brought an action against the Canton of St. Gallen and asked for a declaration that the agreement of 1891 could not be varied or terminated except by agreement between the parties, and that the existing relations did not justify the transfer of Lampertswil to the jurisdiction of the parish council of Kirchberg and to the authorities of St. Gallen solely on the unilateral request of the occupant. St. Gallen opposed the request.

Since the situation with which the Court had to deal was substantially one of a so-called International State Servitude, by virtue of which the Canton of St. Gallen was bound to refrain within some part of her territory from exercising certain powers of a public law character

flowing from her territorical sovereignty and to permit a corresponding assumption of those powers by a public authority of Thurgau, the Court first had to recogniz that such a relationship, and the partial abandonment of sovereignity which it implied, were accepted by doctrines of international law. Secondly, the Court admitted that in the present case the relations between the Cantons were to be treated precisely as those between independent states, as was said in the judgment rendered by the Federal Court on February 17, 1882, in the case of *Lucerne v. Aargau*.[60] Thirdly, the Court laid down the principle that agreements between states of a legal nature, as in the case of the creation of a servitude contemplating an objective legal tie involving subjective rights and duties, must remain binding in the absence of a provision for renunciation contained in the original agreement. Fourthly, in order to ascertain the perpetual character of the agreement, the Court pointed to the fact that the present relation between the Cantons had lasted for a long time and had been in effect without alteration since the creation of the two Cantons in 1803. The Court added that the present tie was neither a temporary relation nor one terminable at the will of one party, and that a change in the internal legislation or in the constitution of the servient Canton could not suffice to justify the repudiation of an agreement of such a character.

The only question which remained to be considered by the Court was whether St. Gallen was entitled to

[60] *Entscheidungen des Schweizerischen Bundergerichts,* vol. 8 (1882), p. 57. See above, p. 152-3.

release herself from this agreement under the doctrine of *rebus sic stantibus* on the ground of a change in the material circumstances. As to this question, the Court first pointed out that, in the often quoted judgment in the case of *Lucerne v. Aargau,* decided by the same Court, the right of denunciation on such grounds was conceded, not merely because the continuation of the servitude was incompatible with the existence of the servient Canton as an independent state, or that it had become meaningless, but also because there had been a change in those circumstances which, having regard to the declared intentions of the parties at the time the servitude was created, must be regarded as having constituted the tacit condition of the agreement. However, the Court laid down the proper procedure as to the operation of the doctrine by saying that even if this view were accepted it was still essential that, if such a change of circumstances was to be invoked as a reason for denunciation, the party interested must invoke it within a certain defined interval from the moment when the change was first clearly perceived. And, the Court added,

> If the Servient Canton nevertheless permits the relationship to continue for decades, her conduct shows that these changed circumstances were not present to her mind as the tacit condition of the agreement. Hence, according to the principle of good faith which must obtain in inter-state matters as elsewhere, the *clausula* cannot later on be invoked by her in order to obtain a release from its obligation.

Thus, according to the opinion of the Court, the circumstances which St. Gallen invoked as "new" were only

trifling. A desire on the part of St. Gallen, and of the occupant of the land in question, to incorporate Lampertswill in Kirchberg for church purposes, did not afford this Canton the right to proceed to a unilateral repudiation of an existing international obligation, to which she agreed and which she took over at the time of her creation, from the régime previously existing in the territory. For these reasons, the Court allowed the claim of Thurgau.

At first glance it seems as if the Court rejected the operation of the doctrine in regard to state servitude. But, as the latter part of the judgment has shown, the Court, in reference to the judgment in the case of *Lucerne v. Aargau* laid down by the same Court in 1882, explicitly conceded the right to denunciation under the doctrine of *rebus sic stantibus* with regard to such agreements. However, the Court strictly limited its operation to "a change in those circumstances which, having regard to the declared intentions of the parties at the time the servitude was created, must be regarded as having constituted the tacit condition of the agreement." Moreover, the Court pointed out that, in such an instance, the party denouncing must invoke it within a certain defined interval when the change is first clearly perceived. Thus in the present judgment it cannot be conceived that the Court rejected the doctrine in principle. The inapplicability of the doctrine in the case, as the judgment shows, was based on two reasonable grounds. First, judging from subsequent conduct of St. Gallen towards Thurgau, the Court held that the changed circumstances alleged by

the former could not be conceived to constitute the tacit condition of the agreement when it was entered into. Secondly, the Court conceived that the circumstances which St. Gallen invoked were only trifling matters which, according to the principle of good faith, could not be invoked to justify her unilateral denunciation.

### § 4. *Summary Observation*

The foregoing cases summarize to some extent the judicial consideration of the doctrine during the past few decades. Although there has been some light thrown upon the legal phase of our problem, yet, in consideration of the complexity of particular circumstances attending each individual case, there is still lacking a scientific statement upon the subject, expounded by a competent international judiciary. Thus we can hardly conclude that the doctrine has been sufficiently developed and formulated to be called a legal doctrine *in sensu strictiore* capable of being applied by judicial tribunals in the settlement of all controversies arising from obsolete treaty obligations.[61]

Moreover, as we have seen, although in the cases of the *French Nationality Decrees* and the *Sino-Belgian Treaty of 1865* the doctrine was raised before the Permanent Court of International Justice, the issue was dropped chiefly because of unnecessary continuation of the proceedings in consequence of subsequent success in diplomatic

61 Professor Baker, in connection with the discussion on obligatory jurisdiction of the Permanent Court of International Justice, observed that the doctrine can be well applied by the Court if it has obligatory jurisdiction. See B. Y. I. L., 1925, pp. 97-100.

negotiations. Even in the very recent *Free Zones Case,* referred to above, the doctrine did not receive due consideration. For, as we have seen, the Court in that case refused to consider any of the questions of principle involved in the doctrine for the simple reason that France, in invoking the doctrine, had failed to present the necessary facts.[62] Thus the legality of the doctrine remains somewhat obscure in international jurisprudence. However by implication and inference, some juridical aspects of the doctrine may be found in these cases.

The first important and significant point deserving of notice is the fact that there is no case from which it can be inferred that the court has rejected the doctrine in principle, although its application has been rejected in certain cases. For example, the negative attitude of the court toward the application of the doctrine in the case of *Prussia v. Bremen* does not mean that the principle of the doctrine cannot be pleaded as a ground for termination of treaties on account of changed circumstances, but that its application in such a case would tend to violate the object of the treaty, which is, in fact, the decisive point as regards applicability of the doctrine. Moreover, in this case, as well as in the case of *Lucerne v. Aargau,* the principle of the doctrine was specifically recognized by the courts as a sound justification for the termination of treaties under certain conditions.

The second important point in these decisions relates to the limitations set forth by the courts to the applicable sphere of the doctrine:

[62] See above, p. 139.

First, in the decisions of *Rothschild and Son v. Egyptian Government* and *Hooper v. United States,* the courts recognized that the doctrine can be applicable only to contracts and obligations of an indefinite duration, but not to those which have specific fixed and limited terms.[63]

Secondly, as in the decision of *Hooper v. United States,* by quoting the view of Wharton, the Court recognized that the doctrine can be applied to those cases in which the reason for a treaty has failed.[64]

Thirdly, in a certain limited sense, as decided in *Lucerne v. Aargau* and the *Indemnities Case between Russia and Turkey,* and referred to in *Thurgau v. St. Gallen,* the courts recognized that, in certain circumstances, the right of unilateral denunciation of a treaty by a state may be justified. The conditions justifying such an action, the courts have said, are: either if the continuation of the treaty obligations will be incompatible with the existence as an independent state of the party thus burdened; or if there has been a change in those

[63] Cf. French contention in *Nationality Decree Case,* in which this point was also brought out. See above, p. 131.

[64] Even in the case *Lespeschki v. Gosweiler,* although the Court, in conformity with the view of a majority of writers, did not recognize that the change of internal government may be interpreted as a changed circumstance which affects the binding force of a treaty, the court recognized that, in certain cases, the existence of a certain form of government may be the sole reason for the conclusion of a treaty. Upon the change of such a form of government the treaty may lose its *raison d'être.* Thus, by inference, the decision of the court in this case was in conformity with that decided in *Hooper v. United States*: that is, the termination of the treaty through the operation of the doctrine depends on whether or not the reason or object of the treaty has failed.

circumstances which, in reference to the declared intention of the parties at the time the treaty was concluded, must be regarded as having constituted the tacit condition of the agreement. In addition, as the Swiss courts pointed out in *Lucerne v. Aargau* and *Thurgau v. St. Gallen,* the party denouncing must invoke the doctrine within a certain defined interval from the moment when the change was first clearly perceived.[65]

Fourthly, in answering the question as to how to determine the implied conditions upon which the validity of treaty obligation in a definite treaty depends, the courts seem to agree that the intention of the contracting parties at the time of the conclusion of the treaty should be regarded as a test for interpretation. Thus, in *Lucerne v. Aargau,* decided by the Supreme Court of Switzerland in 1882, the court said that the doctrine should be invoked in such cases where there had taken place "such a change of circumstances as, according to

[65] It should be observed, however, that in the judgment of the *Free Zones Case* rendered by the Permanent Court of International Justice, the right of unilateral denunciation, even in the existence of an express stipulation to the effect of abrogating certain inapplicable provisions in the treaty was denied by the court pending a negotiation for an agreement of common consent between the parties. On the other hand, such a principle that treaties should be interpreted in favor of independence and sovereignty of states has been affirmed recently by the United States—Sweden Arbitration. In this case, the tribunal upholds the fundamental principle that sovereign states, being in the natural state of liberty and independence, are not to be presumed to have abandoned any part of their liberty and independence. Consequently, the tribunal says, in interpreting any treaty "the high contracting parties to a treaty are to be considered as bound only within the limits of what can be clearly and unequivocally found in the provisions agreed to, and that those provisions, in case of doubt, are to be interpreted in favor of the natural liberty and independence of the party concerned." See A.J.I.L., vol. 26 (1932), p. 834. Cf. *Ibid.,* p. 720 *seq*

the apparent intention of the parties, constituted, at the time of its creation, an implied condition of its continued existence." This point was again recognized in the case, *Thurgau v. St. Gallen,* by the same court in 1928.

Fifthly, the juridical distinction between impossibility of performance due to the fault of one of the parties and impossibility of performance caused by no fault of either party was emphasized in the *Martini Case* held by the Italian-Venezuelan Arbitration Commission in 1903. In that case the court refused to allow the defendant any indemnity for such damages as resulted from an unfortunate consequence of war, which is generally admitted in jurisprudence as an act of God beyond the control and foresight of human beings.

Thus far the doctrine *rebus sic stantibus,* quite apart from its political aspect, contains some legal and juridical elements which, in the presence of a competent judicial authority may well be developed so as to be applicable to justiciable questions arising from treaty obligations on account of changed conditions. Such possibility of restricting the doctrine to its legal sphere has been foreseen by some writers, and the direction of such legal development has been indicated in the creation of the new international order as represented by the League of Nations and the Permanent Court of International Justice.[66] But, as we have seen, the problem arising from treaty obligations on account of changed circumstances is not based entirely, sometimes not at all, on legal grounds. This is because treaties, especially those concluded after a defeat

[66] For example, see especially Baker, *loc. cit.*

in war and known as treaties of peace, may become obsolete and oppressive and out of accord with postulates of justice and equity even at the time of their conclusion and in the eyes of those who took part therein. In this sense, no implied object of the treaty and no apparent intention of the contracting parties can be legally inferred to interpret such questions as impossibility of performance, frustration of the object of the treaty, or injury to the existence, independence and development of a state.[67] Moreover, such treaties are usually concluded without providing stipulations for their modification or termination. Can the doctrine be considered applicable to such treaties? If it can, as was said in the cases of *Rothschild and Sons v. Egyptian Government* and *Hooper v. United States,* it would defeat the intention of one party or parties and at times it would tend to violate the object of the treaty. If not, what may be said as to the juridical and beneficial elements of the doctrine. In fact, most of the instances in which the doctrine has been invoked are in connection with those treaties which were in nature and in essence politically oppressive and inequitable, and which were intended so to be at the time of their conclusion, and without provision of a time limit to their duration. Until an international order shall be

[67] Except that the court will give very liberal interpretations to such questions as the considerations of moral sentiments and equitable claims of the aggrieved party, as Sir John Fischer Williams has pointed qut. But such wide interpretations of treaties will not be accepted by the legalistic English jurists. See Lauterpacht, *Analogies,* p. 174. For scientific liberal interpretation of treaties, reference may be made to a monograph entitled *The Interpretation of Treaties* (New York, 1927) by a Chinese scholar Dr. Yü, a student of Professor Hyde of Columbia University, the chief expounder of the liberal school of treaty interpretation.

so legally organized and all disputes arising from treaty obligations, whether justiciable or not shall be submitted without qualifications by the parties concerned to a competent international judicial organ whose decision will legally and obligatorily bind the disputing parties, there seems very little hope of escaping from the demands of oppressive treaties. A better world order, although probably already in process of formation, will not be able to make its appearance so long as the states of the world are reluctant to see an external authority exercising a compulsory jurisdiction over their so-called "vital interests" or "domestic questions". It is for this reason, that the doctrine has been invoked in the past mostly as a political expedient, and not often as a legal right.[68]

Moreover, it should here be observed that the doctrine, often characterized by a political flavor when applied, involves questions which are beyond the proper jurisdiction of courts of justice. Thus, for intance, in the Tacna-Arica Arbitration, though there existed a clear case that the object of a treaty had been intentionally frustrated by one of the parties, the arbitrator would not pass upon a question in which the honor of a nation was deemed to be involved.

[68] As pointed out by Baker (*loc. cit.*, p. 99), even in the dispute between France and Great Britain in 1908 concerning eighteenth-century treaty relating to fishery rights in Newfoundland, the doctrine could be pleaded by the latter on purely legal grounds before an arbitration tribunal, but Great Britain, on account of the opposition of Newfoundland, refused arbitration, basing her action on the political ground that the dispute fell within the treaty reservation of "vital interests". This case is highly instructive, for it shows the difficulty of applying legal propositions to the actual relations of states when they are willing to stand above legal grounds in order to reserve their freedom of action.

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